29

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 160.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

H. B. SHEPHERD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED MAY 25, 1914.

(24,236)

(24,236)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1915.

1 *Return to Writ.*

In the Supreme Court of the State of Oklahoma.

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this 20th day of May, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court
of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

2 Filed Apr. 30, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2978.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. B. Shepherd, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Supreme Court of the State of Oklahoma, wherein St. Louis and San Francisco Railroad Company is plaintiff in error and you, H. B. Shepherd, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness the Honorable Matthew J. Kane, Chief Justice of the

Supreme Court of the State of Oklahoma, this 28th day of April, 1914.

[Seal Supreme Court, State of Oklahoma.]

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

3 *Acceptance of Service.*

PAULS VALLEY, OKLAHOMA,
April 29, 1914.

I, the undersigned, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge service of the above citation, and enter an appearance in the Supreme Court of the United States.

J. B. THOMPSON,
By L. H. HAMPTON,
Attorney for Defendant in Error.

4 Filed Apr. 28, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2978.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

H. B. SHEPHERD, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Oklahoma:

Your petitioner, St. Louis and San Francisco Railroad Company, respectfully shows that on the 9th day of December, 1913, the Supreme Court of the State of Oklahoma entered a judgment herein in favor of the defendant in error and against the plaintiff in error, in which said judgment and proceedings had prior thereto in this

cause certain errors were committed, to the prejudice of this petitioner; all of which more in detail appear in the assignment of errors filed with this petition.

That after the rendition of said judgment and on the 23rd day of December, 1913, your petitioner filed a petition for rehearing; that thereafter, and on the 7th day of April, 1914, an order was made by this court denying said petition for rehearing. Thereupon, an opinion was filed in this cause by this court, affirming the judgment of the County Court of Murray County, State of Oklahoma, which opinion is a part of the record in this cause. And your petitioner, the defendant below, respectfully shows that there was a judgment in said cause in the County Court of Murray County, State of Oklahoma, in favor of the defendant in error and against your petitioner for the sum of Seven Hundred ($700.) Dollars and costs of suit, which said judgment, upon appeal to the Supreme Court of Oklahoma, was affirmed by said court.

And your petitioner further respectfully shows that the said Supreme Court of the State of Oklahoma is the highest court of the State of Oklahoma in which a decision in said cause could be had. And your petitioner claims the right to remove said cause to the United States Supreme Court by writ of error, under the Statutes of the United States authorizing writs of error to State Courts, inasmuch as in said judgment of said Supreme Court of the State of Oklahoma and the proceedings in said cause certain errors were committed to the prejudice of petitioner, all of which will more in detail appear from the assignments which are filed with this petition.

And because by said judgment of the said Supreme Court of the State of Oklahoma there was denied to your petitioner a right, title, privilege or immunity claimed by your petitioner in the proceedings in said cause under the Constitution of the United States, and under the several Statutes of the United States, and an authority exercised under the United States;

And because your petitioner claimed in said cause that the contract for the transportation of the property of said defendant in error from Ft. Worth, Texas, to Kansas City, Missouri, as alleged in the petition filed in said cause, was evidenced by a receipt, bill of lading or written contract issued, made and delivered under and in accordance with the Statutes of the United States,—that is to say, an Act of Congress approved February 4, 1887, and in effect April 5, 1887, (24 Stat. at L. 379), as amended by an Act approved March 2, 1889, (25 Stat. at L. 885), and by an Act approved February 10, 1891, (26 Stat. at L. 743), and by an Act approved February 8, 1895, (28 Stat. at L. 643), and by an Act approved June 29, 1906, (34 Stat. at L. 384), known as the Interstate Commerce Act, or An Act to Regulate Commerce; and that the only right or remedy of said defendant in error to enforce a liability against your petitioner for any loss, damage or injury to said property so being transported in interstate commerce was that conferred by the Acts of Congress above referred to, and that said right or remedy so provided was, and is exclusive of and superseded all rights or

remedies previously existing under the common law, or by virtue of any state statute or regulation, which said claim of a right, title or immunity under said Act of Congress and the Amendments thereto was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma;

And because your petitioner claimed in said cause the right to limit its liability for any loss, damage or injury to property being
7 carried and transported in interstate commerce by a special contract in writing, made and entered into under and in accordance with the provisions of an Act of Congress and the Amendments thereto above referred to, for a valuable consideration, and for the purpose of determining which of two alternative rates shall apply to said shipment, which said claim of a right, title or immunity under said Act of Congress and Amendments thereto was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma;

And because your petitioner in said cause claimed the right to adopt, put into effect, and observe schedules for the movement of trains and the transportation of freight and property from a point in one state to a point in another state; and that its action in adopting schedules and providing the service which it will furnish the general public is not subject to review by any state court or tribunal, or otherwise than by the Interstate Commerce Commission, as provided by the Statutes of the United States,—that is to say, by said Interstate Commerce Act and the Amendments thereto, above referred to,—which said claim of a right, title or immunity under said Act of Congress and the Amendments thereto was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma;

And because your petitioner claimed in said cause that it was prohibited by a statute of the United States,—that is to say, by an Act of Congress approved June 29, 1906, (34 Stat. at L. 607)—from confining in cars the livestock of defendant in error being carried and transported from a point in one state to a point in another state
8 for a period in excess of thirty-six (36) consecutive hours without unloading same for feed, rest and water; and further claimed the right to unload said livestock being so transported, in order to comply with said Statute of the United States above referred to, and to avoid the penalties thereby imposed; and further claimed immunity from liability for delay caused by reason of said unloading, which said claim of a right, title or immunity under said Act of Congress was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma;

Wherefore, your petitioner claims and says that by a final judgment in a suit in the highest court of the State of Oklahoma in which a decision in said cause could be had, there was a right, title, privilege or immunity which was specially set up or claimed under the Constitution of and under the Statutes of the United States by your petitioner, and the decision of said court was against such right, title, privilege or immunity which was so specifically set up and claimed by your petitioner under such Constitution and such Stat-

ate; and wherefore, and in accordance with the statutes in such cases made and provided, your petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner prays for the allowance of a citation in due form of law, and your petitioner will ever pray.

9 ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Petitioner and Plaintiff in Error.

By W. F. EVANS,
R. A. KLEINSCHMIDT,
E. H. FOSTER,
Its Attorneys.

10 Filed, Apr. 28, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2978.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error.
vs.
H. B. SHEPHERD, Defendant in Error.

Assignments of Error.

Comes now St. Louis and San Francisco Railroad Company, plaintiff in error in the above entitled cause, and respectfully shows that on the trial of said cause, and in the rendition of the judgment of the trial court, and in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to its prejudice, which are apparent from the record therein; that the errors committed by the trial court and affirmed by the Supreme Court of the State, and committed by the Supreme Court of the State in its opinion and judgment in said cause, are more fully and particularly set forth as follows:

11 First. The Supreme Court of Oklahoma erred in affirming the judgment of the County Court of Murray County, State of Oklahoma.

Second. The Supreme Court of Oklahoma erred in not reversing said judgment of the County Court of Murray County, State of Oklahoma.

Third. The Supreme Court of Oklahoma erred in holding that

defendant in error might pursue a common law remedy to recover damages against plaintiff in error for any loss, damage or injury caused to the property of defendant in error which was being conveyed from a point in one state to a point in another state, and in holding that said common law remedy was not superseded by the Act of Congress approved February 4, 1887, and the Amendments thereto, commonly called the Interstate Commerce Act, or An Act to Regulate Commerce.

Fourth. The Supreme Court of Oklahoma erred in holding that defendant in error might sue for and recover damages for any loss, damage or injury caused to property being conveyed by a common carrier from a point in one state to a point in another state, otherwise than as holder of the receipt or bill of lading issued by said common carrier, under and in accordance with the provisions of said Act of Congress approved February 4, 1887, and the Amendments thereto, commonly called the Interstate Commerce Act, or An Act to Regulate Commerce.

Fifth. The Supreme Court of Oklahoma erred in refusing to hold that a common carrier receiving or accepting property to be conveyed from a point in one state to a point in another might limit its liability for any loss, damage, or injury to said
12 property occurring in the course of transportation by a contract in writing, based upon a valuable consideration and made for the purpose of adjusting the freight rates and for the purpose of determining which of two alternative rates provided by the published tariffs of said carrier on file with the Interstate Commerce Commission should apply to said shipment.

Sixth. The Supreme Court of Oklahoma erred in holding that the written contract under which the property of defendant in error was conveyed from Ft. Worth, Texas, to Kansas City, Missouri, was not binding upon defendant in error.

Seventh. The Supreme Court of Oklahoma erred in refusing to hold that the 4th stipulation of the written contract under which the property of defendant in error was conveyed from a point in one state to a point in another state was valid and binding; said stipulation of said contract being in words and figures as follows:

"For the consideration aforesaid, it is expressly agreed that the livestock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market."

Eighth. The Supreme Court of Oklahoma erred in refusing to hold that the 11th stipulation of the written contract under which the property of defendant in error was conveyed from a point in one state to a point in another state was valid and binding; said stipulation of said contract being in words and figures as follows:

"That as a condition precedent to a recovery for any damage for delay, loss or injury to livestock covered by this contract, the
13 second party will give notice in writing of the claim thereto for to some General Officer, or the nearest station agent of the first party, or to the agent at destination, or some General Officer of the delivering line, before such Stock is removed from the

point of shipment or from the point of destination, and before such Stock is mingled with other stock, such written notification to be served within one day after the delivery of such Stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

Ninth. The Supreme Court of Oklahoma erred in refusing to hold that the 14th stipulation of the written contract under which the property of defendant in error was conveyed from a point in one state to a point in another state was valid and binding; said stipulation of said contract being in words and figures as follows:

"That no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall accrue, and should any suit or action be commenced against t[illegible] first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

Tenth. The Supreme Court of Oklahoma erred in denying to plaintiff in error the right to establish schedules providing for the carriage and transportation of property delivered to it as a common carrier to be conveyed from a point in one state to a point in another state.

Eleventh. The Supreme Court of Oklahoma erred in holding that the schedules established and put in force by plaintiff in error, providing for the carriage and transportation of property received by it as a common carrier to be conveyed from a point in
14 one state to a point in another state, was not binding upon state courts, and that plaintiff in error could be charged in the state court with negligent delay in the transportation of property in interstate commerce, where the same was conveyed in accordance with the schedules so made, provided and put in force.

Twelfth. The Supreme Court of Oklahoma erred in holding that the courts of the state had authority or jurisdiction to regulate interstate commerce by prescribing rules, regulations, or schedules to be observed by a common carrier in the transportation of property from a point in one state to a point in another state, or that such state courts had authority or jurisdiction to interfere with or abrogate any rules, regulations or schedules adopted by such common carrier regulating the service afforded by it to the public in the transportation of property from a point in one state to a point in another state.

Thirteenth. The Supreme Court of Oklahoma erred in refusing to hold that the authority and jurisdiction conferred upon and vested in the Interstate Commerce Commission by the Act of Congress approved February 4, 1887, as amended by the Act of March 2, 1889, and Act of February 10, 1891, to inquire into the management of the business of all common carriers engaged in interstate commerce, to enforce the provisions of said Acts of Congress, and to prescribe and regulate the service afforded by such

common carrier to the public, is exclusive of all state courts or other tribunals.

15 Fourteenth. The Supreme Court of Oklahoma erred in holding that plaintiff in error was chargeable with negligent delay of a shipment of livestock being conveyed from a point in one state to a point in another state by reason of the unloading of said livestock for feed, rest and water, in compliance with the provisions of the Act of Congress approved June 29, 1906, (34 Stat. at L. 607).

Fifteenth. The Supreme Court of Oklahoma erred in holding that plaintiff in error was liable in damages for refusing to confine in cars, for a period in excess of thirty-six (36) consecutive hours, livestock being conveyed by it as a common carrier from a point in one state to a point in another state.

Sixteenth. The Supreme Court of Oklahoma erred in holding that delay to a shipment of livestock being conveyed by plaintiff in error as a common carrier from a point in one state to a point in another state, caused by the unloading of said livestock for feed, rest and water, in compliance with the Act of Congress approved June 29, 1906, raised a presumption of negligence against plaintiff in error, and rendered it prima facie liable in damages to the owner of said livestock.

For which errors, said St. Louis and San Francisco Railroad Company, plaintiff in error, prays that the said judgment of the Supreme Court of the State of Oklahoma and of the County Court of Murray County, State of Oklahoma, be reversed, and a judgment rendered in favor of plaintiff in error, and for its costs.

W. F. EVANS,
R. A. KLEINSCHMIDT,
E. H. FOSTER,
Attorneys for Plaintiff in Error.

16 In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2978.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

H. B. SHEPHERD, Defendant in Error.

Order Allowing Writ of Error.

Let the writ of error issue as prayed for upon the execution of a bond by St. Louis and San Francisco Railroad Company, payable to H. B. Shepherd, in the sum of Five Hundred Dollars, with good and sufficient sureties, and with condition that said plaintiff in

error shall prosecute its writ of error to effect, and, if it fail to make good its plea, shall pay all costs herein accrued.

Dated at Oklahoma City, in the State of Oklahoma, this 24 day of April, 1914.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

[SEAL.]

Attest:
W. H. L. CAMPBELL,
Clerk Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

(Filed Apr. 28, 1914. W. H. L. Campbell, Clerk.)

17 Filed Apr. 29, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2978.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said court before you, or some of you, the highest court of law or equity in said State in which a decision could be had in said suit between St. Louis and San Francisco Railroad, plaintiff in error, and H. B. Shepherd, de-
18 fendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute or of an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States,

and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of said plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

19 Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 28" day of April, 1914.

ARNOLD C. DOLDE,
Clerk of the United States District Court for the Western District of the State of Oklahoma.

[Seal of the United States District Court, Western District of Oklahoma.]

Approved and allowed by the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

20-22 In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 2978.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

H. B. SHEPHERD, Defendant in Error.

Certificate of Service of Writ of Error.

I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that there has this day been lodged in my office by plaintiff in error a full, true and correct copy of the above and fore-

going writ of error, with all endorsements thereon, for the defendant in error.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 29th day of April, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

* * * * * * *

23 In the Supreme Court of the State of Oklahoma.

#2978.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

Petition in Error.

The said St. Louis & San Francisco Railroad Company, a corporation, plaintiff in error, complains of the said defendant in error, for that the said H. B. Shepherd, at the October, 1910, term of the County Court of Murray County, State of Oklahoma, recovered a judgment by the consideration of said court against the said plaintiff in error in a certain action then pending in said court, wherein the said H. B. Shepherd was plaintiff, and the said St. Louis & San Francisco Railroad Company was defendant. A certified transcript of the record of said court and original casemade, duly certified and attested, is hereto attached, marked exhibit "A" and made a part of this petition in error. And the said St. Louis & San Francisco Railroad Company avers that there is prejudicial error in the said record and proceedings in this, to-wit:

I.

For the reason that the damages are excessive, and appear to have been given under the influence of passion and prejudice.

24 II.

That the verdict is not sustained by sufficient evidence, and is contrary to law.

III.

For errors of law occurring at the trial and excepted to by the defendant herein.

IV.

Error of the Court in overruling defendant's motion for new trial.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that judgment may be here rendered in favor of the plaintiff in error and against the defendant in error, and that the plaintiff in error be restored to all the rights that it has lost by the rendition of said judgment, and that if this Court should determine judgment should not be here rendered for the plaintiff in error, that the judgment of the trial court be reversed and the cause remanded for a new trial, and for such other relief as to the court may seem just and equitable.

W. F. EVANS,
R. A. KLEINSCHMIDT,
E. H. FOSTER,
Attorneys for Plaintiff in Error.

Endorsed: Filed Aug. 25, 1911. W. H. L. Campbell, Clerk. No. — St. Louis & San Francisco R. R. Company, Plaintiff in error, vs. H. B. Shepherd, Defendant in Error. Petition in Error.

25 In the County Court of Murray County, Oklahoma.

H. B. SHEPHERD, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Casemade.

EXHIBIT "A."

Filed Aug. 25, 1911. W. H. L. Campbell, Clerk.

26-30 STATE OF OKLAHOMA,
County of Murray, ss:

In the County Court in and for said County and State.

H. B. SHEPHERD, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Casemade.

Be It Remembered, That heretofore, to-wit, on the 18th day of December, 1909, the said plaintiff, H. B. Shepherd, commenced his action against the said Defendant, St. Louis & San Francisco Railroad Company in the County Court of Murray County, State of Oklahoma, by filing therein his Petition, which was in words and figures as follows:

* * * * * * *

31 *Summons.*

The State of Oklahoma to the Sheriff of Murray County, Greeting:

You are Hereby Commanded to notify St. Louis & San Francisco R. R. Company that it has been sued by H. B. Shepherd in the County Court of Murray County, Oklahoma, and that it must answer the petition of said H. B. Shepherd filed against it in said court, in the City of Sulphur in said county on or before the 17th day of Jan. 1910, or said petition will be taken as true and judgment rendered accordingly.

You will make return of this Summons on or before the 28th day of Dec. 1909.

Given under my hand and the seal of said Court 18th day of Dec. 1909.

HARRY W. FIELDING,
[SEAL.] *Clerk of County Court.*

Suit Brought for Damages.

If the Defendant fail to answer, judgment will be taken for the sum of Eight hundred fifty four and 74/100 dollars $854.74 with interest at the rate of — per centum from the — day of ——, 190--, and cost of suit.

HARRY W. FIELDING,
Clerk of County Court.

I received this summons on the 18th day of December, 1909, at 3 o'clock P. M. and executed the same in my county on the St. Louis & San Francisco Railroad Company by delivering a true and certified copy of this summons to B. F. Flazier, the said B. F. Flazier being the local freight agent of the St. Louis & San Francisco R. R. Co. in Sulphur, Okla. There being no local superintendent of repairs in said county and the defendant the St.
32-39 Louis & San Francisco R. R. Company having failed as required by law to designate some person residing in said Murray County upon whom process or notice issued by a court of record might be served, on the 23rd day of December, 1910.

T. A. MAXWELL, *Sheriff.*
By O. D. GOODWIN, *Deputy.*

Endorsed on back: No. 290. Page 297. Summons. H. B. Shepherd, Plaintiff vs. St. L. & S. F. R. R. Co. Defendant. Issued Dec. 18, 1909. Returnable Dec. 28, 1909. Answer due Jan. 17, 1910. Taxed. J. B. Thompson Atty. for Plaintiff. I hereby certify the within to be a true copy of the original summons now in my possession with all the endorsements thereon. Filed Dec. 27, 1909. Harry W. Fielding, County Judge.

* * * * * * *

40 And thereafter, and on the 13th day of April, 1910, plaintiff filed his amended petition in said cause, which said amended petition is in words and figures as follows, to-wit:

41 In the County Court of Murray County, State of Oklahoma.

H. B. SHEPHERD, Plaintiff,

vs.

THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

First Amended Petition.

The plaintiff, H. B. Shepherd, complaining of the defendant, the St. Louis & San Francisco Railroad Company, represents to the court that the plaintiff is a citizen of the State of Oklahoma, and that the defendant is a railway corporation owning and operating a line of railway into and through Murray County, Oklahoma.

For cause of action against the defendant, the plaintiff represents that heretofore, to-wit, on the 13th day of May, 1909, R. L. Burnett delivered to the said defendant eighty four head of cattle for transportation from Ft. Worth, Texas, to Kansas City, Missouri, and that on said day and date J. C. Mills delivered to said defendant eighty two head of cattle for transportation from Ft. Worth, Texas, to Kansas City, Mo. That at the time said cattle were delivered to said defendant by the said Burnett and Mills they were the property of this plaintiff, and this plaintiff was the real owner of the same. That said cattle were beef cattle and were being shipped to Kansas City for the purpose of being placed upon the market and sold for beef, which fact was well known to the defendant;

That had the defendant transported said cattle with due diligence and without unnecessary delay, the same could have
42 been transported and delivered at Kansas City, Mo., on Saturday the 15th day of May, 1909, and in time for the market on that date.

That the said defendant wholly failed and refused to transport said cattle with due and proper diligence and without unnecessary delay, but on the contrary so negligently transported the same that they did not reach their destination until 3:15 P. M. of May 16th, 1909.

That had said cattle been transported with due diligence, it would have not been necessary to unload and feed the same en route; that by reason of the negligent delay in the transportation of said cattle and of the time required and used by the said defendant, the same shrunk at least forty pounds per head, or a total of 6640 pounds, which at the market price of said cattle on May 15th, 1909 at $5.05 per hundredweight, damaged plaintiff in the sum of $335.32.

That the market of May 17th, when said cattle arrived had declined 25¢ per hundredweight from the market of Saturday, May 15th, when said cattle should have arrived, and said cattle weighed 126470 pounds, and plaintiff was thereby damaged in the sum of $316.27.

Second. For further cause of action against the defendant, the plaintiff shows to the court that had the defendant company transported said cattle with due and proper diligence and delivered the same at their destination within a reasonable time that it would not have been necessary to have unloaded and fed said cattle in transit, but by reason of said negligence and carelessness on the part of the defendant, its agents, servants and employees in the handling and transportation of said cattle it became necessary to unload and feed the same in transit and between the points of destination and
43 the point of origin, and the said cattle were unloaded at Afton in the State of Oklahoma and fed. That the said feed so furnished to said cattle cost this plaintiff the sum of $21.00, and the plaintiff was thereby damaged in the sum of $21.00.

Third. For further cause of action against the defendant the plaintiff shows to the court that said defendant handled said cattle in an extremely rough manner in the transportation of the same from Ft. Worth, Texas, to Kansas City, Mo. That the stock pens at Afton in which the cattle were unloaded and fed and watered were muddy and unfit to place cattle in; that there was no place prepared in which to put feed for the said cattle nor were there any troughs or other watering places prepared outside of the hog troughs which were on the ground, full of mud, and in which the cattle tramp at will. That the cattle were thus placed in said pen at about one o'clock A. M. on the 15th day of May and permitted to remain in said pen until seven thirty P. M. of said date. That on account of the condition of said pens the cattle could get no rest, could not lie down, and became muddy and restless, fought and hooked one another, greatly to the damage of the looks of said cattle and to their sales value, and which condition largely contributed to the shrinkages in weight of said cattle and to the depreciation in their value as hereinbefore alleged.

Fourth. Plaintiff further shows to the court that there were no cattle in the quarantine yards on the market at Kansas City, on Saturday, May 15th, but there was an extraordinary heavy run of cattle on said market on May 17th. That plaintiff at said time was engaged in buying cattle at the stock yards at Ft. Worth, Texas, and shipping the same to the stock yards at Kansas City, Mo., and was what is known as a speculator upon the market; that being a speculator upon the market he was in competition with the buyers of the different packing houses of the United States who had
44-45 their purchasers both at Ft. Worth and Kansas City, and that fact rendered it impossible for a person engaged as plaintiff was at said time and speculating upon the market to dispose of the cattle purchased in the stock yards at Ft. Worth in competition with the buyers from the different packing houses, to sell the same on the market at Kansas City, to buyers who were also in the employ of the same packing houses at Kansas City, except when the supply was short. That had said cattle arrived at Kansas City in due time and when they would have arrived had the defendant transported the same with due and proper care and diligence, plaintiff would have been able to sell the same for the reason that there was a dearth of

cattle on the market at said time. That on Monday the 17th day of May, 1909, there was an extremely heavy run of cattle on said market and by reason of the fact plaintiff was unable to sell and dispose of his cattle to buyers on said market and was compelled to reship the same to St. Louis, Mo., in order to procure a sale for the same, which he did on the night of Monday, May 17th, 1909, at a cost in the way of freight of $166.05, and to plaintiff's damage in said sum. And the plaintiff was further damaged in the way of feed purchased and furnished the said cattle by the plaintiff at Kansas City, Mo., amounting to the sum of $18.20.

Wherefore, the plaintiff says that he has been damaged in the several items above set forth amounting in all to the sum of $854.74, for which sum he brings this suit and asks that the defendant be summoned to appear and answer herein and that upon a trial he recover judgment against said defendant for the sum of $854.74 and interest and costs and such other and further relief as he may show himself entitled to in the premises.

J. B. THOMPSON,
Attorney for Plaintiff.

* * * * * * *

46 And thereafter, and on the 18th day of April, 1910, defendant filed its answer to the first, second and third counts of plaintiff's first amended petition, which said answer as to the first, second and third counts of plaintiff's said first amended petition, is in words and figures as follows, to-wit:

47 STATE OF OKLAHOMA,
Murray County, ss:

In the County Court in and for said County and State.

H. B. SHEPHERD, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Answer.

Comes now the defendant, St. Louis & San Francisco Railroad Company, and files this, its answer to the first, second and third causes of action contained in its amended petition of the plaintiff, filed herein, and answering as to the first, second and third causes of action, contained in said amended petition, answering says:

1. That it denies ach and every allegation therein contained, except such as are hereinafter specifically admitted.

2. Defendant alleges and avers the facts to be that at the time the plaintiff delivered said shipment of cattle to this defendant, that it had two rates for the transportation of live stock, to-wit: A rate at carrier's risk, and a reduced rate under a contract limiting the liability of the carrier, and that plaintiff had the option of ship-

ping the livestock at either of said rates; That plaintiff elected to ship said six (6) cars of cattle at the reduced rate, and in
48 pursuance of such election on his part, requested in writing, through his agents, J. C. Mills and R. L. Burnett, the transportation of said cattle at such reduced rate under the terms of two contracts, limiting the liability of the carrier, said applications being in words and figures as follows, to-wit:

3. "This application is an election on my part to avail myself of a reduced rate by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate, without such limitations."

(Signed) J. C. MILLS."

Witness:

THOS. EDWARDS."

"This application is an election on my part to avail myself of a reduced rate by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate, without such limitations."

(Signed) R. L. BURNETT."

Witness:

THOS. EDWARDS."

The defendant accepted such written declarations to transport such cattle under the terms of said contracts, limiting the liability of the carrier; said written contracts providing for the transportation of said cattle were duly executed by R. L. Burnett and J. C. Mills, the Agents of the plaintiff, and by W. E. Welch, as Agent of this defendant; and copies of the same are hereby attached hereto, marked Exhibits A & B, and made a part of this answer.

3. Further answering, and for further defense, defendant alleges the truth to be that on the 13th day of May, 1909, the plaintiff delivered to the defendant, and the defendant received for shipment 166 head of cattle to be transported from Ft. Worth, Texas, to Kansas City, Mo., under two special live stock contracts entered into by plaintiff and defendant on that date, wherein and whereby plaintiff in consideration of said terms, provisions and con-
49 ditions, in said contract contained, and the agreements so made by the defendant to transport said live stock from Ft. Worth, Texas, to Kansas City, Mo., and the further consideration of the special rate hereinafter pleaded, plaintiff represented and agreed in each of said contracts as follows:

"This Agreement, made at North Ft. Worth station, Tex., May 13th, 1909, between the St. Louis and San Francisco Railroad Company, hereinafter called 'the Company,' party of the first part, and R. L. Burnett, hereinafter called 'the shipper,' of the second part, Witnesseth: That for and in consideration of the considerations hereinafter mentioned, the party of the first part will transport for the said second party, the following cars of Live Stock described

below, and the parties in charge thereof, as hereinafter provided, viz.: 3 cars said to contain 84 head of Bf. cattle and being consigned to Y. R. Barnes from Brady, Tex. Station to Kansas City, Mo. Station, on the line of the Company, and at said last named station to deliver the same to a carrier, whose line may form a part of the route to —, hereinafter called the place of destination, at the rate of — per. —, said rate being a special rate and less than the rate charged for shipments transported at carrier's risk; in consideration of which reduced rate it is mutually agreed between the parties hereto as follows:

"1st. The shipper hereby agrees:

"(*a*) That he will select the car or cars to be used for the transportation of such stock, and before making such selection he will carefully examine and inspect the same, and each one of them, and will only select such cars as are in good and suitable condition; and after such Stock is loaded and before the same leaves the first station above named, he will again examine said car or cars, and will see that all the doors and openings in said cars are closed, and so fastened, and afterwards kept so closed and fastened as to prevent the escape of said Stock therefrom; and that he will at once notify the Company of any defect in the floors, doors, fastenings, or slats on said cars, or in the manner in which such doors or slats are placed upon or attached thereto, and in case of finding any such defect will demand in writing another car or cars in lieu of such car or cars so found defective.

50 "(*b*) That he will load, unload, and when necessary reload, said stock, and feed, water, and attend to the same at his own risk and expense, while the same are in the cars of the Company, or of any connecting line or lines, or while in any stock yards of the Company or any connecting line, and in the event of any unusual delay or detention of said Stock while on said trip, from any cause whatever, the shipper agrees to accept as full compensation for all loss or damage sustained in consequence of such delay, the amount, if anything, actually expended by him or them in the purchase of food and water therefor, and that neither the Company, or any connecting line or lines over which said freight may pass, shall be responsible for any loss, damage, or injury, which may happen to said freight, or be sustained by it while being loaded or unloaded.

"2nd. The Company agrees (*a*) upon being notified of any defect in any car selected by the shipper to put such car in reasonable repair, or to furnish another car upon demand, in writing, being made therefor.

"(*b*) That it will be liable for any actual negligence of itself and its employes in the transportation of said freight subject to the stipulations and limitations of paragraph tenth of this contract.

"3rd. For the consideration aforesaid it is further agreed that neither the Company nor any connecting carrier shall be responsible for any damage, or injury, sustained by said Live Stock, by reason of any defect in the cars used in the transportation thereof, in consequence of the escape of any of said Live Stock through the

doors and openings in said cars, or by reason of the Stock being wild, unruly, weak, maiming each other or themselves, or from fright of animals, or from crowding of one upon another, or from heat or suffocation, whether caused by overloading of said cars or otherwise.

"4th. For the consideration aforesaid, it is expressly agreed that the Live Stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market; that neither the Company nor any connecting line shall be responsible for any delay caused by storm, failure of machinery or cars, or from obstructions of track from any cause, or any injury caused by fire from any cause whatever.

51 "5th. For the consideration aforesaid it is further agreed that the Company shall only be liable for such damage as may result to said stock from negligent transportation or handling of said cars after they are delivered to it at point of shipment, or where they may have been unloaded by shipper for any purpose; and the second party shall bear all damages from his negligence, or failure to do any of the things which he herein contracts to do, or from the negligence of any of his servants. The first party is also hereby exempted from liability for loss or damage caused by any mob, strike, or threatened or actual violence to person or property from any source.

"6th. In consideration of this agreement the party of the second part hereby releases the party of the first part, and connecting lines, from all claims for damages that may be occasioned by fire.

"7th. For the consideration aforesaid the shipper agrees to waive and release and does hereby release the Company from any and all liability for or on account of delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after tender of delivery, and for breach of any alleged contract to furnish cars at any particular time, and the shipper hereby releases and does waive and bar any and all causes of action for any damage whatsoever, that has accrued to the shipper, by any written or verbal contract prior to the execution hereof concerning said Stock or any of them.

"8th. It is mutually agreed that if the destination of the aforesaid cars be on the line of the Ft. Worth & Rio Grande Ry. Co., then the Ft. Worth & Rio Grande Ry. Co. agrees to deliver same to consignee after payment of charges and surrender of contract; but if the destination of such cars be beyond the lines of the Ft. Worth & Rio Grande Ry. Co., then the Ft. Worth & Rio Grande Ry. Co. agrees, and each connecting carrier in turn is hereby authorized, to deliver said cars to connecting carrier for transportation under the terms, stipulation, limitations and agreements, in respect of such further transportation, as may be agreed upon between the shipper and such connecting carrier or carriers.

"Provided, that if no other such contract be required or executed, to cover the movement of the shipment over the line of any
52 carrier in the route then such carrier shall have the benefit of all the stipulations and conditions in this contract, it being

understood that this contract is thereby adopted by the shipper and such carrier as the contract providing for their mutual rights and obligations, but, nevertheless, each carrier in the route shall be liable only for loss or damage occurring on its own road.

"9th. The party of the first part agrees to stop cars at any of its stations for watering and feeding, where it has facilities for so doing, whenever requested in writing to do so by the owner or attendant in charge; and the party of the second part agrees not to confine his stock for a longer period than twenty-eight consecutive hours without unloading the same for rest, feeding and water, for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

"10th. It is further agreed that neither the Company nor any carrier over whose line this stock may be transported shall be liable for any injury to said stock in any amount above the actual damage thereto, nor in any amount in excess of the value thereof as stated in the application of the shipper, which is hereto attached and made a part hereof, and in case of total loss of said stock, or any portion thereof, and claim therefor is made by the shipper against the Company, or any connecting carrier, wherein the value of said stock may be material, the valuation named in said application shall be conclusive upon all parties hereto.

"11th. That, as a condition precedent to a recovery for any damages for delay, loss or injury to Live Stock covered by this contract, the second party will give notice in writing of the claim therefor to some General Officer or the nearest station agent of the first party, or to the agent at destination, or some General Officer of the delivering line, before such Stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such Stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.

"12th. In consideration of free transportation for person or persons to accompany the Live Stock, which shall not include
53 women, infants or other persons unable to perform such services, it is agreed that the said cars and said Live Stock contained therein, are, and shall be in the sole charge of such person or persons for the purpose of attention to and care of the said Live Stock, and the first party shall not be responsible for such attention and care, and further, that the person or persons in charge of such Live Stock covered by this contract, shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person or persons shall leave such caboose car, or pass over or along the cars or tracks, they shall do so at their own risk of personal injury from any cause whatever, and that the party of the first part shall not be required to stop or start its trains or caboose cars from depots or platforms, or to furnish lights for the accomodation or safety of such persons, and the failure of such person or persons to observe such regulations and those printed on the back here-

of, shall be prima facie evidence of negligence on their part in case of injuries resulting therefrom.

"13th. That no person other than the owner of the Stock shipped, or his duly authorized agent, in the name of the owner, shall be allowed to sign this contract, or be permitted to use such free transportation.

"14th. That no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall accrue, and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

"15th. That in making this contract, the undersigned owner, or agent of the owner, of the stock named herein, expressly acknowledges that he has had the option of moving this shipment under the tariff rate, either at carrier's risk or upon a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all stipulations and conditions named herein.

"16th. The evidence that the said party of the second part, after a full understanding thereof, assents to all the conditions of the foregoing contract, is his signature hereto.

"No Agent of this Company has any authority to waive,
54 modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do."

That the agreements in each of said contracts were the same except as to the number of cattle to be transported; that in one contract the number to be transported was 82 head and in the other, 84 head.

4. Defendant alleges the facts to be that the defendant did, at the time of receiving such shipment, as in said contracts it is agreed, have in force two rates on live stock. Under the higher rate, the defendant then and at all times received for shipment live stock of the kind covered by this shipment without any limitations whatever, under its common law liability as a carrier. Under the lower rate, the defendant then, and at all times, accepted such live stock only under a live stock contract like the ones entered into by the plaintiff and defendant; that all shippers of live stock, including the plaintiff, had the option of shipping under either of said rates, and the plaintiff voluntarily elected to and agreed to ship under the lower rate, under the terms and conditions above set forth.

5. Defendant further answering, alleges that the plaintiff failed and refused to comply with each and every provision and condition in said contracts contained, and that the defendant complied with each and every condition of said contracts on its part, and the de-

fendant specifically pleads each and every condition and agreement in said contracts contained as a defense to this action.

6. Further answering, and for further defense, defendant specifically avers that it is provided in the 4th paragraph or pro-
55 vision of each of the contracts above referred to, as follows:

"For the consideration aforesaid it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market; that neither the Company nor any connecting line shall be responsible for any delay caused by storm, failure of machinery or cars, or from obstructions of track from any cause, or any injury caused by fire from any cause, whatever."

Defendant further alleges that at the time said live stock was delivered to the defendant for shipment, the plaintiff failed to notify the defendant that said live stock was to be transported for any particular market, and the defendant specifically denies that plaintiff had any agreement with any of its agents to transport said live stock within any specified time.

Wherefore, Having fully answered as to the first, second and third causes of action contained in plaintiff's amended petition, defendant asks that it be discharged as to said causes of action, with its costs, and that the plaintiff have nothing from this defendant on account of said first, second and third causes of action contained in his amended petition.

R. A. KLEINSCHMIDT,
W. H. CLOUD,
Attorneys for Defendant.

56 EXHIBIT "A."

Fort Worth & Rio Grande Railway Company.

Read this Contract carefully, as numerous changes have been made.

Notice.

This Company Has Two Rates On Live Stock.

Shippers of Live Stock will take notice that rates of freight, and the extent of liability of the Company, are governed by the valuations which they place thereon. Rates of freight are on file and will to be shown by Agent on Application.

To the Ft. Worth & Rio Grande Railway Company:

The undersigned offers for shipment over your road 82 head of Bf. cattle from North Ft. Worth to Kansas City, each head of the estimated weight of 800 pounds, and valued at 40.00 Dollars per ——, which valuation is named by me for the purpose of securing a reduced rate of freight on this shipment; and I agree that in case of loss or damage to same said valuation so named shall be conclu-

sive, should I make any claim for such loss or damage against any carrier over whose line the same may pass.

This application is an election on my part to avail myself of a reduced rate, by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitations.

J. C. MILLS,
Owner or Shipper.

THOS. EDWARDS.

The Ft. Worth & Rio Grande Railway Company accepts this shipment and the above valuation as a basis for fixing the rate of freight thereon.

FT. WORTH & RIO GRANDE
RAILWAY COMPANY,
By W. E. WELCH, *Agent.*

NOTE.—The rates of freight on Live Stock are fixed in view of the nature and extent of liability, assumed by the carrier, and all kinds of live stock shipped in car loads under a contract similar to the following, limiting the liability of the carrier, are taken at reduced rates; all kinds of live stock will be taken at carrier's risks if the shipper so elects, at rates provided by the existing tariffs, classifications, and under the provisions and conditions relating thereto; and in either event no agent of this Company has any power to bind it in any way, with regard to the shipment of live stock, except by written contract.

57 Original.

Live Stock Contract.

This Agreement, made at North Ft. Worth station, Tex., May 13th, 1909, between the Ft. Worth and Rio Grande Railway Company, hereinafter called "the Company, party of the first part, and J. C. Mills, hereinafter called "the shipper," of the second part, Witnesseth: That for and in consideration of the considerations hereinafter mentioned, the party of the first part will transport for the said second party, the following cars of Live Stock described below, and the parties in charge thereof, as hereinafter provided, viz.: 3 cars said to contain 82 head of Bf. cattle and being consigned to G. R. Barse from Brady, Tex. Station to Kansas City, Mo. Station, on the line of the Company, and at said last named station to deliver the same to a carrier, whose line may form a part of the route to ——, hereinafter called the place of destination, at the rate of —— per ——, said rate being a special rate and less than the rate charged for shipments transported at carrier's risk; in consideration of which reduced rate it is mutually agreed between the parties hereto as follows:

1st. The shipper hereby agrees:

(*a*) That he will select the car or cars to be used for the transportation of such stock, and before making such selection he will carefully examine and inspect the same, and each one of them, and will only select such cars as are in good and suitable condition; and after such Stock is loaded and before the same leaves the first station above named, he will again examine said car or cars, and will see that all the doors and openings in said cars are closed, and so fastened, and afterwards kept so closed and fastened as to prevent the escape of said Stock therefrom; and that he will at once notify the Company of any defect in the floors, doors, fastenings, or slats on said cars, or in the manner in which such doors or slats are placed upon or attached thereto, and in case of finding any such defect will demand in writing another car or cars in lieu of such car or cars so found defective.

(*b*) That he will load, unload, and when necessary reload, said stock, and feed, water and attend to the same at his own risk and expense, while the same are in the cars of the Company, or of any connecting line or lines, or while in any stock yards of the Company or any connecting line, and in the event of any unusual delay or detention of said Stock while on said trip, from any cause whatever, the shipper agrees to accept as full compensation for all loss or damage sustained in consequence of such delay, the amount, if anything, actually expended by him or them in the purchase of food and water therefor, and that neither the Company, nor any connecting line or lines over which said freight may pass, shall be responsible for any loss, damage, or injury, which may happen to said freight or be sustained by it while being loaded or un-
58 loaded.

2nd. The Company agrees (*a*) upon being notified of any defect in any car selected by the shipper to put such car in reasonable repair, or to furnish another car upon demand, in writing, being made therefor.

(*b*) That it will be liable for any actual negligence of itself and its employes in the transportation of said freight subject to the stipulations and limitations of paragraph tenth of this contract.

3rd. For the consideration aforesaid, it is further agreed that neither the Company nor any connecting carrier shall be responsible for any damage, or injury, sustained by said Live Stock, by reason of any defect in the cars used in the transportation thereof, in consequence of the escape of any of said Live Stock through the doors and openings in said cars, or by reason of the Stock being wild, unruly, weak, maiming each other or themselves, or from fright of animals, or from crowding of one upon another, or from heat or suffocation, whether caused by overloading of said cars or otherwise.

4th. For the consideration aforesaid, it is expressly agreed that the Live Stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market; that neither the Company nor any connecting line shall be responsible for any delay caused by storm, failure of machinery or cars, or from obstructions of track

from any cause, or any injury caused by fire from any cause whatever.

5th. For the consideration aforesaid, it is further agreed that the Company shall only be liable for such damage as may result to said stock from negligent transportation or handling of said cars after they are delivered to it at point of shipment, or where they may have been unloaded by shipper for any purpose; and the second party shall bear all damages from his negligence, or failure to do any of the things which he herein contracts to do, or from the negligence of any of his servants. The first party is also hereby exempted from liability for loss or damage caused by any mob, strike, or threatened or actual violence to person or property from any source.

6th. In consideration of this agreement the party of the second part hereby releases the party of the first part, and connecting lines, from all claims for damages that may be occasioned by fire.

7th. For the consideration aforesaid the shipper agrees to waive and release and does hereby release the Company from any and all liability for or on account of delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after tender of delivery, and for breach of any alleged contract to furnish cars at any particular time, and the shipper hereby releases and does waive and bar any and all causes of action for any damage whatsoever, that has accrued to the shipper, by any written or verbal contract prior to the execution hereof concerning said Stock or any of them.

8th. It is mutually agreed that if the destination of the aforesaid cars be on the line of the Ft. Worth & Rio Grande Ry. Co., then the Ft. Worth & Rio Grande Ry. Co. agrees to deliver same to consignee after payment of charges and surrender of con-
59 tract; but if the destination of such cars be beyond the lines of the Ft. Worth & Rio Grande Ry. Co., then the Ft. Worth & Rio Grande Ry. Co. agrees, and each connecting carrier in turn is hereby authorized to deliver said cars to connecting carrier for transportation under the terms, stipulations, limitations and agreements, in respect of such further transportation, as may be agreed upon between the shipper and such connecting carrier or carriers.

Provided, that if no other such contract be required or executed, to cover the movement of the shipment over the line of any carrier in the route, then such carrier shall have the benefit of all the stipulations and conditions in this contract, it being understood that this contract is thereby adopted by the shipper and such carrier as the contract providing for their mutual rights and obligations, but, nevertheless, each carrier in the route shall be liable only for loss or damage occurring on its own road.

9th. The party of the first part agrees to stop cars at any of its stations for watering and feeding, where it has facilities for so doing, whenever requested in writing to do so by the owner or attendant in charge; and the party of the second part agrees not to confine his stock for a longer period than twenty-eight consecutive hours without unloading the same for rest, feeding and water, for a period

of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes.

10th. It is further agreed that neither the Company nor any carrier over whose line this stock may be transported shall be liable for any injury to said stock in any amount above the actual damage thereto, nor in any amount in excess of the value thereof as stated in the application of the shipper, which is hereto attached and made a part hereof, and in case of total loss of said stock, or any portion thereof, and claim thereof is made by the shipper against the Company, or any connecting carrier, wherein the value of said stock may be material, the valuation named in said application shall be conclusive upon all parties hereto.

11th. That, as a condition precedent to a recovery for any damages for delay, loss or injury to Live Stock covered by this contract, the second party will give notice in writing of the claim therefor to some General Officer or the nearest station agent of the first party, or to the agent at destination, or some General Officer of the delivering line, before such Stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.

60 12th. In consideration of free transportation for person or persons to accompany the Live Stock, which shall not include women, infants, or other persons unable to perform such services, it is agreed that the said cars and said Live Stock contained therein, are and shall be in the sole charge of such person or persons for the purpose of attention to and care of the said Live Stock, and the first party shall not be responsible for such attention and care, and further, that the person or persons in charge of such Live Stock covered by this contract, shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person or persons shall leave such caboose car, or pass over or along the cars or tracks, they shall do so at their own risk of personal injury from any cause whatever, and that the party of the first part shall not be required to stop or start its trains or caboose cars from depots or platforms, or to furnish lights for the accommodation or safety of such persons, and the failure of such person or persons to observe such regulations and those printed on the back hereof, shall be prima facie evidence of negligence on their part in case of injuries resulting therefrom.

13th. That no person other than the owner of the Stock shipped, or his duly authorized agent, in the name of the owner, shall be allowed to sign this contract, or be permitted to use such free transportation.

14th. That no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of ac-

tion shall accrue, and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

15th. That in making this contract, the undersigned, owner or agent of the owner, of the stock named herein, expressly acknowledges that he has had the option of moving this shipment under the tariff rate, either at carrier's risk or upon a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all stipulations and conditions named herein.

16th. The evidence that the said party of the second part, after a full understanding thereof, assents to all the conditions of the foregoing contract, is his signature hereto.

No Agent of this Company has any authority to waive, modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do.

W. E. WELCH,
Agent for the Ft. Worth & Rio Grande Railway Co.
J. C. MILLS, *Shipper.*

Witness:
THOS. EDWARDS.

(To be other than either party hereto.)

61 (On back of contract:) Form 1134. May 13, 1909. Original.

Live Stock Contract.

The undersigned, owners or in charge of the Live Stock mentioned in the within contract, in consideration of the free pass granted us by the Ft. Worth & Rio Grande Railway Company, hereby agree that the Ft. Worth & Rio Grande Railway Company shall not be liable for any injury or damage of any kind suffered by us while in charge of said Stock or on our return passage, and we hereby further agree to observe the following regulations, and do hereby release said Railroad Co., or those operating same, from all liability for any injury or damage suffered by us, if injured while violating said regulations.

Will remain in the caboose car attached to the train drawing said car while the train is in motion.

Will get on and off said caboose car only while the same is still.

Will not get on, or be on, any freight car while switching is being done at stations.

Will not walk or stand on any track or station or other place at night without lantern.

H. B. SHEPHERD,
W. E. WELCH, *Agent.*
(*Parties in Charge Accompanying Live Stock.*)

NOTICE.—Agents will issue contracts in duplicate, the original to be given to shipper, and the duplicate kept on file by Agent issuing.

Rules for Passing Drovers.

The number of persons, if any, entitled to free transportation with shipments of Live Stock shipped under this Contract is fixed by the rules governing the movement between the points specified as published by the Current Tariffs of this Company; agents, before issuing Contracts, will consult such rules and be governed accordingly, it being understood that parties whose signatures appear herein are entitled to free transportation when accompanying shipments covered by this Contract.

Regarding Return Pass.

Drovers who, under established rules of this Company, are entitled to free transportation on their return over the Ft. Worth & Rio Grande Railway must surrender this Contract to the Station Agent at destination of shipment on this road except when shipments are destined to or via points indicated below, such transportation will be furnished at the offices of this Company as follows:

62-69 St. Louis or any point east thereof, except National Stock Yards, Ill., General Freight Office, "Frisco" Building, St. Louis.

National Stock Yards, Ill.—General Live Stock Agent, National Stock Yards.

Memphis, Tenn.—Commercial Office, 89 South Main Street; Union Station Ticket Office, Memphis.

Kansas City, Mo.—Local Freight Office, Kansas City. (17.)

Valuation Clause.

Ratings given herein are based upon declared valuations by shippers not exceeding the following:

Each Horse or Pony (Gelding, Mare or Stallion.)	
Mule or Jack	$100.00
Each Ox or Bull	30.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00

Animals valued at more than as herein above specified will be received or transported only under other special contract.

Agents will, in all instances, see that shipper's valuations are filled in in blank spaces left for that purpose in application attached to the contract, and that such application, as well as the contract, is signed by the shipper or his authorized agent.

30-3-13-729-644-Moss X640-5-14-E539-9438 Ex. 132 G348 C99 5/15 C. H. Heiz. H. B. Shepherd. W. H. Stubblefield, Cond.

Car No.	Initials.	No. of head.	Way-bills. Series.	No.
46810	S. F.	28	36	
49778		27	36	
4043	S. B. V.	27	37	

* * * * * * *

70 And thereafter, and on the same day, to-wit: the 18th day of April, 1910, said defendant filed its demurrer to the fourth count of the first amended petition of the plaintiff filed herein, which said demurrer to the fourth count of plaintiff's said first amended petition is in words and figures as follows, to-wit:

71 STATE OF OKLAHOMA,
County of Murray, ss:

In the County Court in and for said County and State.

H. B. SHEPHERD, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Demurrer to Fourth Count of Plaintiff's Petition.

Comes now the above named defendant and demurs to the fourth count of the petition of the plaintiff filed herein, and as grounds of said demurrer, says:

That said fourth count contained in plaintiff's petition, filed herein, does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

R. A. KLEINSCHMIDT,
W. H. CLOUD,
Attorneys for Defendant.

72 Thereafter, and on April 27th, 1910, this cause coming on regularly to be heard upon the demurrer as to the fourth count of plaintiff's said first amended petition, said demurrer was, by the court sustained.

73 & 74 H. B. SHEPHERD, Plaintiff,
vs.
ST. L. & S. F. RY. CO., Defendant.

On this the 27th day of April, 1910, came on regularly to be heard the above entitled cause upon the demurrer of the defendant to the fourth item of plaintiff's petition and thereupon came all parties by their attorneys and announced ready. And the Court having heard the argument of counsel, and being sufficiently advised in the premises doth sustain said demurrer. To which action

of the Court in sustaining said demurrer, the plaintiff then and there in open court duly excepted.

HARRY W. FIELDING,
County Judge.

* * * * * * *

75 Thereafter and on October 17th, 1910, the plaintiff amended his first amended petition in the following particular, to-wit: That the total damage alleged was $1044.35, instead of the sum of $854.74, as alleged in his original petition and also in his first amended petition.

76 In the County Court of Murray County, State of Oklahoma, October, 1910, Term.

Before Harry W. Fielding, Judge.

No. 290.

H. B. SHEPHERD,
vs.
ST. LOUIS & SAN FRANCISCO RAILWAY CO.

Damages.

SULPHUR, OKLAHOMA, October 17th, 1910.

Be it remembered: That on this the 17th day of October, 1910, this cause coming on to be heard before Honorable Harry W. Fielding, Judge of the County Court, J. B. Thompson appearing for the Plaintiff, and Emanuel & Broadbent appearing for the Defendant, the following proceedings were had, to-wit:

Statement of J. B. Thompson to the Jury.

May it please the Court, Gentlemen of the Jury, I think I have practically stated the contention of the Plaintiff when I was examining you with reference to your qualifications to act as Jurors in this case. The evidence in this case will show about this state of facts, we think. That along in the afternoon, somewhere between three and four o'clock, on May 13th, 1906, Mr. Shepherd, the gentleman here (pointing to Walter Shepherd), delivered to the Defendant, St. Louis & San Francisco R'y Co., at Fort Worth, Texas, a car of cattle. There were three or four cars containing one hundred sixty-

77 six (166) head of beef cattle to Kansas City, Missouri. The evidence will show if those cattle had been transported with proper care they could have been delivered in Kansas City on the morning of the 15th, or within the thirty-six hours, and that was Saturday morning. The cattle were not delivered until Sunday. The evidence will show that the Defendant Company didn't get

them over the road as they are ordinarily shipped, and as they ought to have gotten over the road, had they been handled with proper care and diligence. Instead of getting into Kansas City in time for the market on the 15th, on Saturday, they didn't get there until Sunday afternoon between three and four o'clock, and of course there wasn't any market on Sunday, and they had to be put on the Monday market. The evidence will show that these cattle if they had gotten in there in time for the Saturday market would have sold for from $5.05 to $5.15 per hundredweight; that the market was good on Saturday. The evidence will show that on Monday there was several thousand head of cattle, a great number, and that the market on that day was only worth $4.65; in other words, there was a loss of forty cents (.40) per hundredweight by reason of the depreciation in the value of the cattle. The evidence will show further that the cattle were unloaded en route. They were so long in transporting them from Fort Worth to Kansas City that the thirty-six hour limit expired, and they unloaded them over here at Afton in a pen 80 x 129 feet; that there was a mud hole in the pen, no feed racks, and they only had a few little hog troughs, and the evidence will show that a number of the troughs were on the ground, and the only way they had to water the cattle was by hauling water and pouring it into these hog troughs on the ground; that these cattle were crowded up in a pen with some Texas cattle; most of them became frightened when people came around; that the pen was on the Main Street in Afton, and people passing would crawl up on the fence and look at them, thus frightening the cattle, and the cattle kept running there from one o'clock in
78 the forenoon on the 15th up until something like eight or nine o'clock at night. All during that morning and during that day they were running around in this mud hole, and were delivered in Kansas City on Sunday. The evidence of men who are experienced in handling cattle, who are engaged in that line of business, will be, that cattle will lose from twenty-five to fifty pounds per head every twenty-four hours they are delayed in transit. That the cattle in transit were fed on cake meal and hay, and the Plaintiff was out forty cents per hundredweight on account of the decline in the market. The cattle weighed 126470 pounds. They depreciated in weight over 6000 lbs., which at $5.05 per hundredweight, if sold on Saturday, would be over $300., and the evidence will show that the feed bill over at Afton amounted to $21.00. If they had been transported into Kansas City in due time, it would not have been necessary to have fed them there. Those items are what we ask. If we prove these facts, we will expect a verdict from you gentlemen for the amount of damages the evidence might show, by reason of this delay.

Statement of C. B. Emanuel to Jury.

Defendant desires to reserve an exception to that portion of the statement of Counsel for Plaintiff, with reference to any delay or damages that might have occurred on their line, the line of the St. Louis & San Francisco R'y Co. of Texas, while in the Fort Worth yards.

By H. W. BROADBENT:

Gentlemen of the jury, to place our side of the case before you, we represent the St. Louis & San Francisco Railway Co., Defendant in this case. We have on file answer here, in which we set up the original live stock contract under which these cattle were shipped, showing that they were shipped originally over Fort Worth & Rio Grande Railway Company over this Company's rails, and that we expect to show that we received this shipment on our rails, and expect to show you that we handled this shipment in the proper manner; that instead of delaying this shipment, that we actually
79 made up some time that we had lost before we received it; that we actually gained some time. We expect to show you, and it will not be denied that in shipping we had a thirty-six hour release, proably most of you understand that. Under our Federal laws cattle must be unloaded inside of twenty-eight hours, they cannot be held over that on the cars, anyway they cannot be held over thirty-six hours. We expect to show you from the time the cattle were loaded on the cars until they reached Afton was about twenty-eight hours. That goes to show you they couldn't possibly have gotten into Kansas City inside of the thirty-six hours; it was absolutely impossible to have done so under the Federal laws that were in force. It is immaterial whether they were unloaded at Fort Scott or Afton, but it was necessary that they be unloaded somewhere to save the thirty-six hour release clause. So having to unload these cattle necessarily they couldn't have gotten into Kansas City for the Saturday market. We expect to show you from day to day that it would have been impossible to have gotten these cattle into Kansas City for the market on Saturday morning under any circumstances—could hardly have done it on the passenger train. We expect to show you that these cattle were unloaded at Afton on account of the Federal laws, because it was not possible to carry those cattle into Kansas City for the Saturday market, so they were kept there all day. The fact of their being kept there all day didn't affect their market condition. It was impossible for them to have gotten there for the Saturday morning market so there was no occasion to rush them through. They arrived in Kansas City on Sunday, in time for them to get well filled and in good shape for Monday's market. If we show that we made this shipment without any negligence, while it is not our place to prove there was any negligence, we are entitled to a verdict, and we shall expect it at your hands. We have attached to our Answer a copy of the contract, which will speak for itself and will be introduced in evidence at the proper time.

80 WALTER SHEPHERD, after being first duly sworn on behalf of the Plaintiffs, testifies as follows:

Direct examination by J. B. THOMPSON:

Q. What is your name?
A. Walter Shepherd.
Q. Where do you live?
A. Weoteka, Oklahoma.

Q. Are you the plaintiff in this case?
A. My brother is the plaintiff.
Q. Do you know anything about the shipment of the cattle in this case?
A. Yes sir, I bought them and shipped them myself.
Q. What business you and your brother in?
A. We were buying and shipping cattle.
Q. When did that first take place?
A. In Fort Worth, Texas.
Q. Did you ship the cattle from Fort Worth?
A. Yes sir.
Q. When?
A. May 13th, 1909.
Q. At what time were the cattle delivered on May 13th, 1909, to the Defendant Company?
A. They were notified about three o'clock there would be six cars to go out over their road that night.
Q. When did they start the cattle?
A. The cattle were loaded at 5:45 and left Fort Worth at 7:35.
Q. Left an hour and fifty minutes after being loaded?
A. Yes sir.
Q. Then how did they transport them, when did they get into Kansas City?
81 A. On Sunday, May 16th, at 3:15.
Q. When?
A. P. M.
Q. In the afternoon?
A. Yes sir.
Q. They were from 5:45 in the afternoon of the 13th, to 3:15 in the afternoon of the 16th transporting those cattle?
A. Yes sir.
Q. Had you prior to that time, shortly, had any experience in shipping cattle from Fort Worth to Kansas City over Defendant's road?
A. Yes sir.
Q. How long prior to that time had it been before you made a shipment to them?
A. Sent four cars out of Fort Worth April 30th, 1909, and the cattle were delivered in Kansas City inside of the thirty-six hours.
Q. You accompanied the cattle yourself?
A. Yes sir.
Q. Tell the jury within what time those cattle were transported from Fort Worth to Kansas City?
A. Inside of thirty-six hours.
Q. Do you know the distance from Fort Worth to Kansas City?
—. ——.
A. What is it?
A. Over the Frisco it is 576 miles.
Q. Do you know what time you would have to make in order to transport these cattle from Fort Worth to Kansas City, what mileage per hour?

A. About 16 miles.

Q. Now, is that the ordinary run over the Frisco to Kansas City, within the thirty-six hours?

82 A. Yes sir, the ordinary run.

Q. How much did those cattle weigh at Fort Worth?

A. 134,220 lbs.

Q. On an average?

A. Something over 800 lbs.

Q. What kind of cattle were they?

A. Texas steers.

Q. What kind?

A. Well fed, good stock of Texas steers.

Q. Fed cattle, or grass cattle?

A. Fed cattle.

Q. What kind of feed?

A. Meal and cottonseed and cake.

Q. Will ask you if you are acquainted with what the market was for beef cattle at Kansas City, on May 15th, 1909, Saturday? Were you acquainted with the market at that time?

A. Yes sir.

Q. What was the market value of those cattle at Kansas City at that time?

A. Not less than $5.05 per hundredweight on Saturday morning, if I had gotten there.

Q. Are you acquainted with the official market report of the cattle market at Kansas City at that time?

A. Yes sir.

Q. When were these quotations given in?

A. Got them from Daily Drovers Telegram.

Q. Is that an official instrument that carries reports of cattle?

A. A telegram carrying the cattle market.

Q. The official report from Kansas City stock yard at that time?

A. Yes sir, got a telegram every morning.

Q. Was that an official report given out?

A. Yes sir.

83 Q. What was that?

A. A telegram.

Q. Was that recognized as a correct report and condition of the cattle market?

A. Yes sir, I think so.

Q. Ask you to look at that paper and see if you can identify that as a copy of the Daily Drovers Telegram, May 15th, 1909?

A. Yes sir.

Q. Please refer to the part of it that gives the condition of the Texas quarantine market. Is that the market your cattle would have gone on?

A. Yes sir.

Q. Is there a part there with reference to that?

A. Yes sir.

Q. What part? (Hands witness paper).

Q. On the first page?

A. Yes sir.
Q. Where I have marked with a pencil?
A. Yes sir.

Plaintiff Counsel desires to offer in evidence this statement from the paper, Daily Drovers Telegram, May 15th, 1909, Marked Exhibit "A."

"Cattle—Texas Division.

There were received in the Texas Division, 406 cattle and 179 calves. All went direct to packers. For the week receipts aggregated 2,974 cattle and 513 calves, against 3,725 cattle and 262 calves last week, and 5,778 cattle and 1,396 calves the same week a year ago. Top steers sold Wednesday at $6.45. The steer market generally was active and strong closing a shade higher than the opening Monday. There were few grass steers in the run, the bulk being mealfed from Texas. Cow prices show little change. Several good bunches sold during the week at $4.75 the top. The bulk of calf offerings went direct to packers. The quality generally was mixed and on the common order. A few good veals reached $6.50, the top. The market compared with last week's close shows no change. Receipts in the Southern division by days this week
84 were as follows, with comparisons:

	Cars.	Cattle.	Calves.
Monday	51	1,166	160
Tuesday	17	426	3
Wednesday	21	418	169
Thursday	12	278	1
Friday	11	280	1
Saturday	20	406	179
Total for week	132	2,974	513
Last week	170	3,725	262
Year ago	244	5,778	1,396"

Q. Mr. Shepherd, will ask you to explain what is meant by this portion of that report "all went direct to packers."
A. Cattle that were bought (interrupted)

Defendant's Counsel object for the reason it is not material. Objection is overruled by the Court, to which ruling of the Court Defendant's Counsel then and there duly excepted.

Q. What is generally understood by the term "all went direct to packers?"
A. Cattle bought and packed out in the country and shipped into Kansas City and went direct to packers.
Q. Was there any cattle reported on the quarantine market at Kansas City on Saturday, May 15th, 1909?

Counsel for defense objects for the reason it is incompetent, irrelevant and immaterial. Objection is overruled by the Court, to

which ruling of the Court Counsel for the defense then and there duly excepted.

A. No cattle on the market in the quarantine yard for sale on Saturday, May 15th, 1909.

Q. Mr. Shepherd, — ask you to look at this paper and tell us what that is, please sir?

A. Daily Drovers Telegram, May 17th, 1909.

Q. On Monday following?

A. Yes sir.

85 Q. Look at the part of it there that covers the character and quality of cattle that these were. Refer to it so that we can identify it.

A. Texas Division, on page 1.

Q. The part I have marked here?

A. Yes sir, that is it.

Counsel for the Plaintiff offers in evidence that part of the Daily Drovers Telegram, May 17th, 1909, with reference to the Texas Division of cattle.

(Marked Exhibit "B.")

"Cattle—Texas Division.

In the Texas division receipts aggregated 3,268 cattle and 645 calves, the heaviest run of the season. With the exception of a few early sales, steer prices generally ruled 10¢ lower. The bulk of the run came from Texas. Several sales, including a car of yearlings, weighing 763 lbs. brought $6.40, the top. The supply of cows was good cows selling steady. Top cows brought $4.75. There was a liberal run of calves, and a good many handy weight veals, and which sold steady. Top veals, a carload from Texas brought $6.50.

Texas Steers.

59	1054	6 00	82	1221	6 00
20	1118	5 75	131	830	4 25
67	1029	5 80	45	1108	5 60
98	955	5 70	1	1230	5 65
68	961	5 70	77	949	5 70
43	1098	5 65	178	1032	5 65
22	1120	5 55	12	969	5 00
41	1110	5 55	27	863	5 20
81	850	4 50	27	866	4 50
52	789	4 25			

Texas Cows.

19	735	3 35	58	812	3 40
11	746	3 00	3	716	3 75

Texas Heifers.

5	852	4 70	45	466	3 15
1	530	4 25	2	380	3 60

Texas Bulls.

1	1010	3 75	1	1130	3 65

Texas Calves.

12	157	6 00	6	176	5 00
85	170	5 50	13	210	4 00

86

Oklahoma Steers.

31 yrls.....	761	6 40	45	906	3 30
269	1348	6 40	95	1304	6 25
19	1285	6 35	21	1100	5 60
22	1127	6 00	24	1116	5 90
20	922	5 35	5	562	3 05
49	843	5 10	48	1105	5 35
6	616	4 40	23	793	3 40

Oklahoma Cows.

8	899	4 75	7	682	3 50
28	1001	4 70	16	796	3 75
22	882	4 25	1	940	4 00
6	836	4 40	8	852	3 40
3	936	3 50	1	750	3 00

Oklahoma Heifers.

3	546	4 50	6	596	3 60
1	550	4 35			

Oklahoma Bulls.

5	1084	4 25	1	1220	4 00
13	632	3 10			

Oklahoma Stags.

5	818	4 50			

Oklahoma Calves.

7	171	6 50	18	190	5 25
17	210	4 50	11	197	4 25
1	240	5 25"			

Q. Mr. Shepherd, were you on the market Monday?
A. Yes sir.
Q. Do you know what the market value of your cattle that you had there Monday was?
A. Yes sir.
Q. What was it?
A. About $4.60 to $4.65.
Q. As against $5.05 on Saturday?
A. Yes sir.
Q. What experience have you had in shipping cattle?
A. Over thirty years.

Q. Thirty years experience as a shipper?
A. Yes sir.

87 Q. Will ask you, from your experience as a shipper, to estimate approximately what the depreciation in weight of cattle of this character and kind, and fed like these cattle, would be per day, after they had been out, say a couple of days.
A. Yes sir, I am able to say.
Q. Tell the jury what would be the usual shrinkage in cattle of this kind after they had been out a couple, or three or four days.

Counsel for the defense object for the reason there is nothing in the evidence to show that they had been out three or four days. That is misleading the to let that evidence go in. Counsel for the Plaintiff says he will connect it up.

Q. Were the cattle originated at Fort Worth, or some other place?

Counsel for the defense objects for the reason it is absolutely immaterial in this case. It doesn't make any difference where they originated from. Objection is overruled by the Court, to which ruling of the Court Counsel for the defense then and there duly excepted.

A. The shipment originated at Brady, Texas.
Q. Ask you what would be the ordinary shrinkage of cattle of this kind and class for the 3rd and 4th days?
A. From twenty-five to thirty pounds a day. They begin to lose flesh as well as life.
Q. Now, you may state to the jury the route from Fort Worth to Kansas City, tell how the run is made.
A. The run from Fort Worth to Sherman. Leave Fort Worth at 7:35 and arrive at Sherman (interrupted.)

Counsel for the defense objects for the reason that it is not over the route of the St. Louis & San Francisco Railway, and it will be absolutely necessary to show that. (Not ruled on).

88 Q. Where was that delivered to the Frisco?
A. At Fort Worth, Texas.

Counsel for the defense objects for the reason the contract is in evidence, and is the best evidence. His evidence cannot contradict the terms of a written contract. Objection is overruled by the Court, to which ruling of the Court Counsel for the defense then and there duly excepted.

Counsel for the defense objects to this evidence and moves the Court to strike out the answer of the witness, for the reason the Defendant has filed an Answer and duly pleaded the original contract made and entered into by the Plaintiff and the Fort Worth & Rio Grande R'y Co. Such answer and contract has not been denied, and the Defendant moves the Court to strike out all the evidence with reference to the shipment and receipt of the stock at Fort Worth and at Brady, and asks the Court to instruct the jury not to consider such evidence for any purpose.

Objection overruled by the Court to which ruling of the Court Counsel for the defense then and there duly excepted.

A. We arrived at 3:15 next morning. Left Sherman 5:05 a. m. and arrived at Frances at 11:15. Left Frances 11:45 and arrived at Sapulpa (interrupted).

Q. Have you a memorandum that you made at the time?

A. Yes sir.

Q. Refer to it and refresh your memory.

A. Arrived at Sapulpa 5:45 P. M. May 14th, and left 6:20 P. M. May 14th. Arrived at Afton 11:00 P. M. May 14th. They were unloaded there in that small pen at Afton 80 x 120 without feed racks or water.

Counsel for the defense objects to the last part of the an-
89 swer. Objection is sustained by the Court.

Q. When did you arrive at Afton?

A. 11:00 P. M.

Q. What was done with them there?

A. Unloaded.

Q. When?

A. Got through unloading about one o'clock in the morning, on the 15th.

Q. What kind of a pen were they unloaded in?

A. In a common stock pen.

Q. What was the size?

A. 80 x 120 feet, the outside dimensions.

Q. How many cattle were there?

A. 166 head.

Q. What was the condition of that pen, describe it to the jury?

A. The pen had a big mud hole right in the center, but around the fence was comparatively dry.

Q. Were the stock fed any there?

A. Yes sir.

Q. What was fed to them?

A. 18 bales of hay, 3 bales to the car, and they said they would give them more.

Q. When were they fed?

A. Fed in the morning.

Q. Were they fed any time after that?

A. I ordered twelve more bales to be fed to them in the afternoon.

Q. So thirty bales were fed to them?

A. Yes sir.

Q. How were these pens fixed for feeding cattle?

90 A. They were not fixed at all. They put the hay on the ground around next to the fence and in spots through the lot, where they could get at it.

Q. How did the cattle rest during that time?

A. They didn't get any rest to speak of.

Q. Why?

A. The pen was right on the Main street of the town. It was on Saturday and people passing backwards and forwards, and crawling

up on the fence looking at them, would scare them and they would run through this mud hole backwards and forwards all the day.

Q. What were they doing to one another?

A. Running and hooking one another, and they didn't have room for the cattle to lay down and rest.

Q. How were they fixed with reference to water?

A. Had five troughs made out of 2 x 12 lumber, 12 feet long.

Q. Where were those troughs?

A. Setting along on the ground.

Q. What had they been used for?

A. Hog troughs.

Q. Ask you to state what the condition of the troughs was.

A. In a pretty bad condition.

Q. Anything in them?

A. Well, they needed cleaning out. We cleaned them out as good as we could.

Q. What was in them?

A. Mud and trash.

Q. Was there any water there for them?

A. No sir, no water.

Q. How did they get what water they did get?

91 A. They hauled it in barrels.

Q. How did they put it in the troughs?

A. Poured it in.

Q. Will ask you to state whether or not the cattle got what water they wanted?

A. No sir, not what feed they wanted either.

Q. When were the cattle reloaded and sent out of there?

A. About 7:00 that evening, and left at 9:30.

Q. What had been done between 7:00 and 9:30?

A. They were standing on the track waiting for the train.

Q. Then where did they take them?

A. From there to Kansas City; arrived at Kansas City 3:15 next afternoon.

Q. How long were they on the road from the time they were delivered to the Defendant Company until they were delivered at Kansas City?

A. Seventy-two (72) hours.

Q. What was the condition of the cattle when they arrived in Kansas City?

A. They had mud on their legs and bellies and pretty badly drawn.

Q. Is that or not contributed to their depreciation in value?

A. Yes sir.

Counsel for the defense objects for the reason it calls for a conclusion of the witness. Objection is overruled by the Court, to which ruling of the Court Counsel for the defense then and there duly excepted.

Cross-examination by C. B. EMANUEL:

Q. What did you say your name was?
A. Walter Shepherd.
Q. H. B. Shepherd?
92 A. No sir, he is my brother.
Q. What is your brother's name?
A. Henry B. Shepherd.
Q. Mr. Shepherd, how long do you say you have been in the cattle business?
A. Over thirty years.
Q. Are you with your brother?
A. Yes sir.
Q. You bought these cattle in Fort Worth?
A. Yes sir. They were shipped to Fort Worth by man named Mills from Brady.
Q. To Fort Worth?
A. Yes sir.
Q. You had a right to stop the cattle at Fort Worth and subsequently to ship them on the same bill of lading.
A. Yes sir.
Q. When they were at Fort Worth you bought this particular stock of cattle?
A. Yes sir.
Q. You don't know anything about them, but that they came from Brady?
A. No sir.
Q. You never saw the cattle until they arrived in Fort Worth?
A. No sir.
Q. I believe you said you bought them in May?
A. Yes sir.
Q. You say they were meal fed cattle?
A. Meal and cake fed.
Q. You never saw them fed yourself?
A. No sir.
93 Q. Have never been to Brady yourself?
A. No sir, never have.
Q. As a matter of fact, you don't know whether there is an oil mill at Brady or not, do you?
A. There doesn't necessarily have to be.
Q. As a matter of fact, you don't know whether there is an oil mill there or not?
A. No sir.
Q. You won't know whether or not Mr. Mills' ranch is situated about 22½ miles northwest of Brady, do you?
A. No sir.
Q. You don't know of your own knowledge whether they were shipped off of Mr. Mills' ranch or not?
A. Only as he told me.
Q. Merely a matter of hearsay, wasn't it?
A. I know what he told me.

Q. Your statement is based absolutely on hearsay?
A. What he told me about feeding them, I know.
Q. When did you feed the cattle?
A. In the afternoon, on the 13th of May.
Q. What time in the afternoon did you negotiate the sale of these cattle?
A. About two o'clock.
Q. Now then, to whom did you apply for the shipment of these cattle?
A. To the Cassady Southwestern Commission Co. Told them to put in an order.
Q. You didn't put in the order yourself?
A. No sir, never did.
Q. And you got the Cassady Southwestern Commission Company to do it for you?
A. Yes sir.
Q. What time did you go to their office?
94 A. Between two and three.
Q. Just after you had bought the cattle?
A. Yes sir.
Q. Were the cattle weighed out to you?
A. Yes sir, weighed to H. B. Shepherd.
Q. What Commission Company did you buy them from?
A. Cassady Southwestern Commission Company.
Q. They weighed 134,220 pounds?
A. Yes sir.
Q. What did you pay for them?

Counsel for the Plaintiff objects for the reason it is incompetent, irrelevant and immaterial. Objection is sustained by the Court, to which ruling of the Court Counsel for the defense then and there duly excepted.

Q. Did you see to the loading of the cattle yourself?
A. No sir.
Q. Where were they when you bought them?
A. In the stock yards at Fort Worth.
Q. You had been on the market some time, had you not?
A. Yes sir.
Q. You are familiar with the moving or transportation of handling cattle in the stock yards in and around Fort Worth?
A. Yes sir, familiar with it in the yard.
Q. You knew there was a terminal or belt line that hauled cattle to and from the stock yard?
A. Yes sir.
Q. The Frisco Railway Company's line doesn't touch the stock yards, does it?
A. No sir, think not.
Q. Did you go with the cattle yourself?
95 A. Yes sir.
Q. How many cars of cattle were there?
A. Six cars.

Q. What kind of train were they shipped on?
A. On the regular train out of Fort Worth.
Q. So far as you know, there was no promise made by your agent of any extraordinary handling of these cattle, other than the regular schedule time, was there?

Counsel for the Plaintiff objects for the reason this is not an issue in this case. Objection is overruled by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

Q. So far as you know, there was no promise made to you of any extraordinary handling of these cattle other than the regular schedule, was there?
A. No sir.
Q. They were put in a train of other freight cars, and other freight?
A. Yes sir.
Q. It wasn't a regular cattle train?
A. No sir, not a full train of cattle.
Q. I believe you said that you had shipped cattle twice through from Fort Worth to Kansas City on the thirty-six hour schedule?
A. Over to Frisco.
Q. How many shipments have you made over the Frisco?
A. Three, I think, out of Fort Worth.
Q. Ever shipped any before?
A. I have shipped over the Frisco lots of times, but not out of Fort Worth.
Q. That was a full train of cattle?
A. No sir.
Q. How many cars?
A. Had four cars that were shipped in one shipment and
96 five in another.
Q. Any other cattle on the train?
A. Yes sir.
Q. How many?
A. I don't know.
Q. As a matter of fact, as a cattle shipper, been in the business thirty years—isn't it a fact, and don't you know it to be a fact, that the average handling of freight trains is about fifteen miles per hour?
A. That is very slow handling.
Q. As a matter of fact, isn't that the average handling, taking into consideration the delays at the Division points?
A. No sir, we generally get better routes than that.
Q. Now, isn't there a Division point at Sherman out of Fort Worth?
A. Yes sir.
Q. Isn't there one at Francis?
A. Yes sir.
Q. And one at Sapulpa?
A. Yes sir.

Q. And one at Afton?
A. Yes sir.
Q. And one at Fort Scott?
A. Yes sir.
Q. Five Division points between Fort Worth and Kansas City?
A. Yes sir.
Q. Now you know, as a man who has had experience in shipping, that Railroad Companies are necessarily delayed at the Division points, in calling the crew together, and so on?
A. Some times they are and some times they are not?
Q. But ordinarily it takes time for them to get the trains
97 up and call their crew?
A. They usually have the crew ready. They ordinarily have them ready.
Q. But at any rate it takes time for them to get a train out of a Division point?
A. No sir, it doesn't take them any extra time. They ought not to be over thirty minutes in getting out of any Division point.
Q. Where they have got live stock in another train, it takes some time to handle that train, doesn't it?
A. They generally ship live stock with through trains.
Q. But nevertheless, it takes time to handle that train at the Division points, doesn't it?
A. That depends on the train bunch.
Q. What has been your experience with handling trains out of Division points?
A. We never have to wait over thirty or forty minutes out of any Division point, some times an accident might happen and cause a delay, but not often. It is not our fault.
Q. Now I believe you said it was 576 miles from Fort Worth to Kansas City?
A. Yes sir.
Q. And five Division points between Fort Worth and Kansas City?
A. Yes sir.
Q. Now I believe you said these cattle got out of Fort Worth at 7:30?
A. 7:35.
Q. At Sherman you met the south bound passenger train, didn't you?
A. We were there almost two hours before it came in.
Q. You met it there?
98 A. Yes sir.
Q. It is just ten miles from Sherman to Denison, isn't it?
A. Yes sir, nine miles.
Q. And Sherman is a Division point on the Frisco?
A. Yes sir.
Q. If it is 576 miles from Fort Worth to Kansas City, to bring it within the thirty-six hour limit, the train would necessarily have to make an average running time of 16 miles per hour, wouldn't it?
A. Yes sir.

Q. Then don't you count anything for stops at the Division points?

A. No sir.

Q. And you say there are five Division points between Fort Worth and Kansas City?

A. Yes sir.

Q. Do you know how far it is from Afton to Kansas City?

A. 190 miles.

Q. At the time you arrived there, there was only seven hours of free time left, wasn't there?

A. Eight, little over eight.

Q. They couldn't have possibly, on that running time, made it into Kansas City within the thirty-six hour limit and take the risk of an accident, and go through all the Division points, could they?

Counsel for the Plaintiff objects for the reason it is incompetent, irrelevant and immaterial, and calls for an opinion of the witness, and is based on hypothesis. Objection is overruled by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

A. Yes sir, I know they ought to have gotten to Afton (interrupted).

99 Counsel for the Plaintiff objects for the reason it is not responsive to the question. Objection is overruled by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

Q. They couldn't possibly have made it into Kansas City within the thirty-six hours, could they?

A. Yes sir, if they had'gotten over the road like they ought to have.

Q. Get over 190 miles in that time?

A. They ought to run faster than that.

Q. And go through all the Division points, and the Division point at Fort Scott?

A. Yes sir, ought not to have lost 60 seconds.

Q. A man that has had thirty years' experience, and who understands the thirty-six hour limit and the necessary delay at Division points, and yet you say it was possible for you to cover that 190 miles within the seven hours of remaining free time?

Counsel for the Plaintiff objects for the reason the witness has already answered that it would be possible to make that time, and because that question is argumentative. Objection is sustained by the Court.

A. It took eight and a half hours to get me into Kansas City.

Q. Now, assuming they could have possibly made it, you wouldn't have possibly arrived upon that time in Kansas City until 8:00 or 8:30, could you?

Counsel for the Plaintiff objects for the reason it is argumentative in form and calls for an opinion of the witness. Objection is over-

ruled by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

Q. What time did the market open in Kansas City? What
100 time does it generally open?

A. Generally, about nine o'clock.

Q. Where is the St. Louis & San Francisco yards with reference to the stock yards?

A. They are out this edge of town, about 1½ miles.

Q. Is there a belt line in Kansas City?

A. Yes sir.

Q. The belt line transfers the stock shipments and other freight upon arrival in Kansas City?

A. Yes sir.

Counsel for the Plaintiff objects for the reason it is incompetent, irrelevant and immaterial. Objection is overruled by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

Q. What time does the stock yard close?

A. The scales close about four o'clock.

Q. What time does the market close?

A. They close the market when they close the scales.

Q. Will ask you if it isn't a fact, that on Saturdays the market is very poor?

A. Some times it is and some times it is not. It is usually the case that the Saturday market is a better day for the sale of cattle. It is not as good as a rule on other days but some times it is better.

Q. But as a rule not as good?

A. Not quite as good.

Q. Isn't that so considered among stock men?

A. Not exactly.

Q. Isn't it a fact that Monday is considered a good day to hit the market?

A. I consider Monday the worst day of the week. That is the general rule among stock men. They all try to get there on
101 Monday and that is the reason it is a bad day.

Q. But it is considered a good day among stock men?

A. Yes sir.

Q. If they had had this car out of Afton within the eight and a half hours at the very outside, it would have been a half day before you could have possibly gotten those cattle upon the market after arriving in Kansas City?

A. No sir, not necessarily so at all.

Q. Then you think this cattle shipment along with other freight, you would have been able to have gotten those cattle upon the market?

A. Yes sir, they could have gotten there by nine o'clock easily.

Q. What did those cattle weigh when they were finally sold?

Counsel for the Plaintiff objects to them going into that unless they go into everything that precedes that. Objection is overruled

by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

Q. What did they weigh when they were finally sold? (Witness examines his memorandum to see).
A. 126,470.
Q. They were weighed Tuesday or Wednesday?
A. Tuesday.
Q. What time?
A. They were weighed just about twelve o'clock.
Q. How much did you say they would shrink the first day out?
A. About forty pounds.
Q. What would they shrink the second day?
A. I made shipments before that (interrupted).
Q. Like this, I mean?
A. The shipment I made just before that, they shrank sixty pounds from Fort Worth to Kansas City.
Q. On the second day out?
102 A. Yes sir. It depends upon their condition when they are weighed at Fort Worth and their condition when weighed at Kansas City.
Q. How much would they shrink the third day?
A. They would begin to shrink pretty heavy.
Q. That is a general answer, how much would you say?
A. Forty or fifty pounds.
Q. How much would they shrink the fourth day?
A. From twenty to twenty-five pounds.
Q. When you waived the twenty-eight hour limit, you bought the cattle as a speculator, and you figured upon the shrinkage that you detailed to the jury.
A. When I bought those cattle (interrupted).
Q. I am not asking you about that, as a speculator upon the market, when you bought these cattle, when you waived the twenty-eight hour limit, you figured upon the amount they would shrink when you arrived in Kansas City?

Counsel for the Plaintiff objects for the reason that is not a proper question, it doesn't cut any figure. Objection is sustained by the Court.

Q. I believe you said that cattle on the market on Saturday were worth $5.05?
A. Yes sir.
Q. You didn't have any cattle on the market that day, did you?
A. No sir, not in the quarantine yards for sale.
Q. There wasn't any market cattle there that day, was there?
A. When the market was going on, the buyers wanted cattle.
Q. There wasn't any quotations on that day, was there?
A. Not in the quarantine yard.
Q. And no market because there were no cattle, isn't that a fact?
A. It doesn't make any difference about that.

Q. There wasn't any cattle there on that market that day,
103 was there?

A. That was the reason, it had been a good day.

Q. Answer my question. There were no quotations on cattle in the quarantine yard on that day, was there?

A. No sir, no sale.

Q. Therefore no market for them?

A. The quotations only quoted market strong and high.

Q. So when you put a value of $5.05 on them, why there wasn't any such value as that quoted upon, was there?

A. Would have been if the cattle had been there.

Q. They weren't there, were they?

A. No sir.

Q. So no quotations of that amount, was there?

A. That doesn't make any difference.

Q. I do insist on you answering my question.

A. There wasn't any quotations there.

Q. Now, Mr. Shepherd, ask you when you got to Afton who unloaded the cattle?

A. They had a man that they sent there to see after that business.

Q. Was he there at this time?

A. Yes sir, I think he was right there at the time, or they sent for him.

Q. Did he insist in the unloading of the cattle?

A. Yes sir.

Q. And put them in the pen?

A. Yes sir.

Q. In the night?

A. Yes sir, twelve and one o'clock. It was about twelve o'clock.

Q. Did they feed the cattle that night?

A. No sir.

Q. When did they?

104 A. Next morning about eight o'clock.

Q. They had hay racks in that pen?

A. No sir, no hay racks.

Q. They had troughs there about three feet off of the ground?

A. No sir, nothing like that off of the ground.

Q. Was there any there off of the ground any distance?

A. Yes sir, may be three or four inches.

Q. Did they feed them in those troughs?

A. No sir.

Q. Didn't feed them at all in troughs?

A. No feed in the troughs, the troughs weren't there for that purpose.

Q. Did they give them plenty of feed with the twelve bales that you gave?

A. Yes sir, had hay troughs.

Q. Did they give them any water?

A. Yes sir.

Q. How much water did they give them?

A. They hauled water all day, tried to give them some.

Q. All day?
A. Yes sir.
Q. And put it in there for the cattle?
A. Yes sir.
Q. When the cattle are fed and watered that way, won't they go into market in better condition than if they went without any at all?
A. Of course they were without any at all.

Redirect examination by J. B. THOMPSON:

Q. Ask you if it isn't a fact when cattle are shipped into the market, say from Fort Worth to Kansas City, and put on the market without being stopped on the road and fed and watered, and when they are fed and watered when taken into Kansas City, if
105 they will not take on a fill that makes them weigh more?
A. Yes sir, that is what we figured on.
Q. And when they are fed en route they take on that fill?
A. Yes sir, and lose it in Kansas City.
Q. And not take it on any more?
A. No sir.
Q. And that is where you get your loss?
A. Yes sir.
Q. Mr. Emanuel asked you a while ago if it were possible to make a run to Kansas City from Afton, barring accidents, within the time that you had. Will ask you if you had ordinarily made that run in the two trips you had made prior to that time?

Counsel for the defense objects for the reason it is based upon what the witness thinks. He only made two trips, and you can't base an ordinary run of a freight train on two trips. Objection is overruled by the Court, to which ruling of the Court Counsel for the Defense then and there duly excepted.

A. They are ordinarily made in a run of that time.
Q. Will ask you if from Afton to Kansas City, 8½ hours, if you ordinarily made the run in that time?
A. A little more time on the second one.
Q. You said a moment ago that you had more time, you don't mean to say it took you longer, do you?

Counsel for the defense objects for the reason the question is leading. Objection is sustained by the Court.

Q. You didn't meet with any accidents on this trip, did you?
A. No sir.
Q. Mr. Emanuel asked you a while ago if there was an oil mill at Brady. Is it usual to have cotton seed oil mills everywhere they feed cattle cake and cotton seed meal?
106 A. No sir, not necessary at all.
Q. Do you have to see cattle fed cotton seed meal and cake in order to know whether they had been fed on that or not?
A. I can tell by looking at the cattle.
Q. How did you judge that these cattle were fed on meal and cake?
A. By the condition of the cattle.

Q. As a matter of fact you can testify that these cattle had been fed on cake and meal?
A. Certainly.

Recross-examination by C. B. EMANUEL:

Q. I wish you would describe to the jury the difference between fed cake cattle and cows that have eaten corn?
A. Their hair is sticky and oily.
Q. Did you examine them?
A. Certainly we did.
Q. Have you ever been in Texas?
A. Yes sir.
Q. Have you been down about Brady?
A. No sir, never was there.
Q. Do you know whether or not there is an oil mill at Brady?
A. No sir, I don't know it.
Q. In the month of May, is there a single oil mill in the entire Southwest that you ever heard of that had any meal or hulls to feed?
A. Yes sir.
Q. In Southwest Texas?
A. All over the country.
Q. And you tell this jury in Southwest Texas, where these cattle came from, that you had cake and hulls to feed the cattle with in the month of may?
A. Certainly, clear up to June.
107 Q. And you have never been there yourself?
A. No sir, but they do in this country.

Witness excused.

J. S. WADE, after being first duly sworn on behalf of the Plaintiff, testifies as follows:

Direct examination by J. B. THOMPSON:

Q. What is your name?
A. J. S. Wade.
Q. Where do you live?
A. West and Southwest of here.
Q. Have you had any experience in shipping beef cattle to market to Kansas City and other markets?
A. Yes sir.
Q. What is your occupation?
A. Farming and handling live stock.
Q. Covering what period of time?
A. Something like six years.
Q. I will ask you to state to the jury, give us an estimate or an average, of the shipments you made during each year of that time.
A. It would be a rough guess. I shipped pretty often.
Q. About how many times a month?
A. Probably one month I would make several shipments, four or five, and for two or three months will not ship anything.

Q. Ask you in shipping beef cattle from this country to Kansas City, what is the ordinary rule in shipping cattle through without any delay, and when they are fed and watered for the first time in Kansas City? What is the ordinary rule with reference to whether or not they lose any great amount of weight?

A. If they fill they will gain back about what they lose.

108 Q. Get you to state, if cattle are delayed en route, and are fed and watered before reaching market, and take on that fiill, if they ordinarily take on a second fill?

A. No sir, they hardly ever fill but once.

Q. Will ask you to state what is the ordinary rule, say beef cattle, after they have once taken on their fill and begin to lose, what is the ordinary decrease in weight per day?

A. It would run anywhere from forty to sixty pounds in twenty-four hours for one or two days.

Cross-examination by C. B. EMANUEL:

Q. How much would they lose in the first eight to twelve hours? That is, rested well, fed and watered?

A. Well, they would lose more proportionally the first time than they would in the whole time.

Q. The first twelve hours?

A. Yes sir.

Q. Than they would the whole time?

A. Yes sir.

Q. Wouldn't they lose more in twelve hours than they would in twenty-four?

A. They would lose more in that time.

Q. How much would you say they would lose, in say ten hours? That is, rested well, loaded and shipped in?

A. It would be owing to how they were handled on the train and how they were loaded. They would lose somewhere from twenty to thirty-five or forty pounds the first ten hours.

Witness excused.

HARRISON WHITE, after being first duly sworn on behalf of the Plaintiff, testifies as follows:

Direct examination by J. B. THOMPSON:

Q. What is your name?

A. Harrison White.

109 Q. Where do you live?

A. In Sulphur.

Q. Have you had any experience in buying, shipping and raising beef cattle for the market?

A. Yes sir.

Q. How many years?

A. Quite a good many, a number of years. About ten, twelve or fifteen.

Q. Did you ship quite often during that time?

A. Yes sir.

Q. Ask you, in your experience as a shipper of beef cattle, what, if any, would be the difference between weighed cattle when they started on their shipment and when they were weighed at their destination, after they had taken on what is known as a fill?

A. It would depend on how they started. If they had a good run all the way through and no rough handling. I will say this so that you will probably understand me. We usually in shipping cattle do not weigh them at the time of loading. We weigh them five or six hours before loading them and in this way get better results.

Counsel for the defense objects. There is no evidence that they didn't weigh these cattle ten hours before they started shipment, and we ask the Court to strike that out. Objection is sustained by the Court.

Q. Take the ordinary shipment, made in the ordinary way, what, if any, would be the difference between the weight at the time of sending and at the destination, after taking on that fill?

A. As to what destination?

Q. Say Kansas City.

110 A. That is the market that we generally ship to. There is a very little difference if you get a continuous run.

Q. If the cattle are delayed en route, so much so that they have to be taken off and fed and watered, and then run on market afterwards so that they would be, say a couple of days, extra there, what would be the loss in weight of those extra days?

Counsel for the Defendant objects for the reason it is assuming a fact that does not exist, so far as this shipment of cattle is concerned.

By the COURT: That is a question for the jury to decide.

To which ruling of the Court Counsel for the defense then and there duly excepted.

A. It would depend on the size of the cattle and on what they had been fed, and so on.

Q. Say cattle that would weigh upwards of 800 pounds, beef cattle, fed on cotton seed cake and meal?

A. I would say the loss would be from twenty-five to thirty pounds at the very least.

Cross-examination by C. B. EMANUEL.

Q. You are a man of family?

A. Yes sir, a small family?

Q. You have got a case yourself against the Santa Fe Railway Company, haven't you?

A. I don't know whether I have or not, I suppose so. We have a case pending against some Railroad Company.

Q. You have been in the cattle business for a long time?

A. Yes sir.

Q. Shipped over the Frisco?

A. Yes sir.

111 Q. Do you know what is meant by the thirty-six hour limit and the twenty-eight hour limit?

A. Yes sir.

Q. Have you ever been to Afton, Okla.?

A. Am not sure about that.

Q. With your experience, where a few cars of cattle are put in with an ordinary freight train, what is the average running time of a train like that from here to Kansas City?

A. These freight trains are liable to do any way.

Q. In your experience in shipping cattle, isn't there always a considerable delay with freight trains at Division points?

A. There is some time at each Division point.

Q. Have you ever had occasion to ship solid cars of cattle?

A. Yes sir.

Q. What is the difference in the running time, where there is a solid train of cattle, and where there is just a few cattle put on an ordinary freight train?

Counsel for Plaintiff objects for the reason there is no evidence put in as to an ordinary freight. It is our contention that Mr. Shepherd had a through freight, not an ordinary train.

Q. Well state as to a through freight.

A. With a through freight cattle should go just as fast as with a complete cattle train. If you understand me and I understand you, we have often shipped over the Santa Fe with through California freight. That is usually a through freight. The Frisco hasn't got any through freights, but I presume they will have through freight from Gulf points.

Q. What is the average running time, if you have ever had occasion to ship with through freight on the Frisco?

A. I would think twenty miles an hour is pretty good

112 running time.

Q. You say twenty miles an hour, what do you mean by that?

A. That is just actual running time.

Q. State as to the necessary delays and stops at Division points.

A. It would take them a reasonable amount of time at Division points, but not for delays.

Redirect examination by J. B. THOMPSON:

Q. In an ordinary run of cattle, including stops that are required at Division points, you would consider twenty miles an hour an ordinary run?

A. I would with a through freight, but not where they switch cars for local freight.

Q. They don't ordinarily put stock in that kind of a train, do they?

A. No sir, but some times they do.

Q. Then a freight train which makes ordinary time ought to run twenty miles an hour, including stops?

A. Yes sir.

Plaintiffs rest in Chief.

Demurrer is interposed on behalf of the defense. Demurrer is overruled by the Court, to which ruling of the Court Counsel for the defense then and there duly excepted. A copy of said demurrer is set out on page 105 of this record.

Witness excused.

GEORGE C. COMSTOCK, after being first duly sworn on behalf of the Defendant, testifies as follows:

Direct examination by H. W. BROADBENT:

Q. State your name.

A. Geo. C. Comstock.

Q. Where do you live?

113 A. Francis, Oklahoma.

Q. State what your official position is, if any, with the St. Louis & San Francisco Railway Company. What was it during the month of May of last year?

A. Chief Train Despatcher.

Q. Ask you, if as such Train Despatcher, you had charge of any records in your office showing the movement of trains in and out?

A. Yes sir, I have the train sheet.

Q. I will hand you these and ask you to state to the jury what those are.

A. These are the daily records showing the movement of all trains and engines over the territory between Red River and Sapulpa.

Q. Ask you if those sheets contain a record of the movement of all trains on May 14th, 1909?

A. Yes sir, from 12 A. M. to 11:59 P. M.

Q. Will ask you to turn to May 14th.

A. Yes sir, I have it.

Q. Ask you if you have a record of a train running over your Division that contains these six cars of stock shipped by Plaintiff in this case, Mr. Shepherd?

A. I have a record of six cars of cattle from Brady, Texas, to Kansas City.

Q. You have the train number.

A. Yes sir, but not on this sheet. I have it in the book.

Q. Will you read those car numbers?

Traversed by J. B. THOMPSON:

Q. Did you keep them?

A. The Conductor that handled the train kept them.

Q. Who kept these train sheets?

A. The Train Despatcher under my supervision.

Q. You didn't keep them?

114 A. I didn't do the writing, I directed the movements of the Despatcher.

Q. Who kept this memorandum? Who made those entries there?
A. The Despatcher.
Q. You didn't?
A. They were kept under my supervision.

(Direct) by C. B. EMANUEL:

Q. Under whose dictation?
A. Mine.
Q. Who supervised the movement of the train, and who was responsible for it?

Counsel for the Plaintiff objects for the reason it is incompetent, irrelevant and immaterial. They can introduce this themselves if they want to. He couldn't refresh his memory from notes somebody else made. Somebody will have to read the record to the jury.

A. That is all we have to go by.

(Direct) by H. W. BROADBENT:

Q. Now ask you to state the train number that contained those six cars of cattle consigned from Brady?
A. 538. Engine No. 642.

Counsel for the defense wishes to offer in evidence the train sheet, or that part which shows the running of this train which contained the six cars of cattle.

(Mr. Broadbent reads to jury.)

(Marked Exhibit "C"—Deft.)

"St. Louis & San Francisco Railway Company train sheet, May 14th, 1909, showing train number 530; left Sherman 5:10 A. M., arrived in Denison 5:40 A. M.; Texas Junction 6:12 A. M.; Woodville 6:26; Kingston 6:44; Madill 7:45; Randolph 8:00 A. M.; Ravia 8:09; Mill Creek 8:58; Scullin 9:22; Hickory 9:30; Roff 9:45; Fitzhugh 9:56; Ada 10:49 P. M.; Frances 11:10 A. M. Stock yard train #530, six cars cattle from Brady to Kansas City, loaded 6:30 P. M. on 13th.

Counsel for the Plaintiff objects for the reason this is not the original entry, it is a copy of something else. That is only a way bill or something. Objection is overruled by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

Q. Will ask you to turn to sheet showing the movement of the train out of Frances; showing the movement of this train with reference to delays between Sherman and Frances.

Counsel for the Plaintiff objects for the reason let him introduce what was on there. That sheet shows the delays.

Q. Where is that sheet?
A. Right there.

(Read by C. B. EMANUEL:)

"Reported in Sherman 4:00 A. M. Time they arrived 3:00 A. M."

Q. Will ask you to explain to the jury what is the meaning of that statement here upon the official record that I have just read?

A. That means the train arrived in Sherman earlier than it was anticipated.

Q. How much earlier?

A. It was reported at 4:00 A. M. and arrived at 3:00.

(C. B. EMANUEL reads:)

"530 F. Conner, Sherman 10 min. blocked by No. 7; Madill 35 min. A. M. C. in the way. Picked up 3 cars as they stop at Madill; Ada 25 min. for #509. Picked up 3 cars as they stop at Madill."

Q. Explain to the jury what is meant by this entry "Ada
116 25 min. for #509?"

A. That means we were meeting passenger train #509 at Ada.

Q. Explain to the jury what is meant by "Sherman 10 min. blocked by #7."

A. Following was the passenger train. It was 10 min. behind it.

Q. Is there a sheet here now showing the movement of this train out of Francis?

A. Yes sir.

Q. What is the number of that train and what is the date?

A. Extra #640, Friday, May 14th, 1909.

Q. What is there on that sheet, if anything, to indicate this is the same train?

A. Had six cars of cattle, Fort Worth to Kansas City, loaded 6:30 P. M. on the 13th.

Counsel for the defense desires to introduce that part of the sheet in evidence with reference to the movement of this car of stock.

Q. What is the number of this train movement?

A. Extra 640.

Q. Explain to the jury what is meant by "Extra 640."

A. We ran an extra train merely as a matter of convenience out of Francis.

(C. B. EMANUEL reads:)

"Out of Francis 11:45 A. M.; Sasakwa 12:03; Holdenville 12:38 A. M., and out of there at 12:45; Wetumka 1:32; Wewoka Junction arrive 1:55; out of there 2:23; Henrietta 2:55; Sluta 3:07, arrived Okmulgee 3:35; out of there 4:10 and at Beggs 5:05; Kiefer 5:32, into Sapulpa 5:50.

Q. Now, is there anything on this sheet that would indicate any delays in that train North of Francis?

117 A. Yes sir, there is at Francis and North of that.

Q. Indicate where it is?

A. Francis 25 min., meeting 2 North #539.

Q. Explain what that means.
A. Meeting South bound train at Okmulgee, 40 min. blocked by O. & C. train, a train coming from another direction; 10 min. picking up cars.
Q. Is that all the delays shown on this sheet North of Francis?
A. Yes sir, all there is any record of.
Q. Now, will ask you if you have anything showing the schedule time, or running time, of a train on those tracks of the Red River Division, and out of the Division North of Francis?
A. I think I have it in that bunch there.
Q. Where is it?
A. This shows the movement of the train from Red River Division.
Q. When?
A. Went into effect on May 14th, 1909.
Q. How do you denominate the schedule time of the train carrying these cattle upon May 14th?
A. The regular Kansas City stock train known as No. 530.
Q. What was the schedule time for that train that day?
A. 13.52 miles per hour, between Sherman and Francis.
Q. What was it North of Francis?
A. 12.66 miles.
Q. That was per hour?
A. Yes sir, per hour.
Q. Now then, under that schedule, how long would it take that train, running upon that schedule time, to go from Sherman to Francis?
A. Seven hours.

Counsel for the Plaintiff objects for the reason it is a matter
118 of conclusion. Objection is overruled by the Court, to which ruling of the Court Counsel for the Plaintiff then and there duly excepted.

A. Seven hours and forty minutes.
Q. How long would it take that train upon the same schedule time, to go from Frances to Sapulpa?
A. Eight hours.
Q. Have you the schedule there for that time between Sapulpa and Afton?
A. I have two schedules between Sapulpa and Afton.
Q. What are they?
A. One is 4 hours and 40 minutes.
Q. What is the other?
A. 5 hours and 45 minutes.
Q. What is the schedule time of that train between Afton and Fort Scott, the next Division?
A. Will have to look at the records to find that (Witness examines record).
A. I think it approximately twelve hours. I couldn't testify to that schedule because I haven't got it here. I think it is from 4:30 P. M. to 10:15 P. M.

Q. How many hours would that be from Afton to Fort Scott.
A. Running time from Afton would be from 4:30 P. M. to 10:40 P. M. That would be 6 hours and 10 minutes.
Q. What is it from Fort Scott to Kansas City?
A. From 4:00 P. M. to 10:15 P. M., 6 hours and 10 minutes.

Cross-examination by J. B. THOMPSON:

Q. You say you are Chief Despatcher?
A. I was at that time.
Q. What are you now?
A. Train Despatcher now.
Q. You weren't Train Despatcher at that time?
119 A. No sir, Chief Despatcher.
Q. Which is the highest job?
A. Chief Despatcher, but the work is more strenuous, and I gave it up.
Q. How long have you been in the employ of the St. Louis & San Francisco R'y Company?
A. Two years and one month and two days.
Q. Where have you been working all this time?
A. At Sapulpa and Frances.
Q. How many times have you testified for the Frisco?
A. First time they have ever had me out.
Q. What was your territory during the month of May, 1909?
A. We had the territory from Sapulpa South, to Texas.
Q. How far?
A. To Texas.
Q. Well, how far?
A. Red River is the State line.
Q. How far South did you handle the train?
A. From Sapulpa into Denison.
Q. Did you have anything to do with the trains running South of there?
A. No sir, under jurisdiction of the Texas line.
Q. I notice something here regarding the H. & T. C. Did your trains run over the H. & T. C?
A. From Sherman to Denison.
Q. In other words, you mean the Frisco doesn't own any track from Sherman to Denison?
A. No sir.
Q. Then you don't have control of the tracks between Sherman and Denison?
A. No sir, none whatever. We just have a lease on it.
Q. The road itself belongs to another company, and you merely have a lease on it for the purpose of operating on it?
120 A. Yes sir.
Q. In other words, the St. Louis & San Francisco R'y Co. have no road between Sherman and Denison, but operate over a leased line?
A. Yes sir.
Q. And from there on into Fort Worth?

A. Yes sir, on its own line.
Q. But what is known as the Red River Division extends from Sapulpa to Sherman?
A. To Red River.
Q. Does the train crew get off at Red River?
A. No [illegible], they go into Sherman. At Fort Worth we have a different Superintendent.
Q. Then from Denison North, you have another Superintendent?
A. Yes sir.
Q. Do you know what the distance is from Sapulpa to Sherman?
A. It is 101 and a fraction miles to Francis, and 96 and a fraction miles from Francis to Denison.
Q. From Denison to Francis is how far?
A. 96 and a fraction miles.
Q. From Denison to Sapulpa is how far?
A. 197 miles.
Q. And how long did you say it takes a stock train to run from Denison to Sapulpa?
A. The schedule was 7 hours and 40 minutes, and 8 hours.
Q. Fifteen hours and 40 minutes?
A. Yes sir.
Q. How much is that per hour?
A. Approximately 15 miles per hour. 12 hours and something, it is shown here.
Q. How about from Sherman to Francis?
A. 13:52 from Sherman to Francis, and 12:60 from Francis to Sapulpa.
121 Q. How long would it take a stock train, through freight train, to make that distance? What is the ordinary time?
A. Ordinary time is about 15 miles per hour. That is the regular schedule. Whenever they are late they might gain a mile or two in an hour.
Q. You say that is the average mileage made by a cattle train?
A. It depends largely upon the number of cars in the train.
Q. You mean a through train?
A. There is a difference between a train of twenty cars and one of three.
Q. What is an average train?
A. Some ship solid, and some just five and ten cars.
Q. What is an ordinary train, how many cars?
A. 650 tons.
Q. How many cars would that be?
A. About 30 tons to the car.
Q. How many cars, will you say twenty cars would be an average train?
A. Yes sir, of solid stock.
Q. Do you know the ordinary time of a train from Fort Worth to Kansas City over the Frisco? What is the ordinary schedule?
A. That is out of my territory, but I should judge (interrupted)——

Q. Do you know?

A. I cannot state it as a fact.

Q. You don't know the schedule time from Fort Worth to Kansas City?

A. No sir, but I judge something like 40 or 50 hours.

Q. Isn't it a fact that they make it within 36 hours?

A. Not that I know of.

Q. You don't know whether they do or not?

A. Don't know anything about it North of Sapulpa.

122 Q. You say you don't know anything about it North of Sapulpa?

A. No sir, nor South of Sapulpa.

Q. What is the distance from Fort Worth to Kansas City?

A. Really, I couldn't tell you. I can get it from those cards there.

Q. If you don't know what the distance is from Fort Worth to Kansas City, why did you tell this jury that you judged it was 40 to 50 hours, the average run?

A. That is what they generally figure on making it in.

Q. What time did you say a while ago it took to get from Fort Scott to Kansas City?

A. I will have to get it off that card. (Witness examines sheet.)

A. From 4:00 to 10:15, would be 6 hours and 15 minutes from Fort Scott to Kansas City.

Q. State what it is from Afton to Fort Scott?

A. From 4:30 P. M. to 10:40 P. M.

Q. How do you get the same time, 4:30 in the afternoon to 10:15 in the afternoon from Afton to Fort Scott, and then 4:00 to 10:15 in the afternoon from Fort Scott to Kansas City. Does that cover the same period?

A. You asked me what time it took to run it in, and I told you what it was.

Q. Doesn't that cover the same period of time, 4:30 in the afternoon from Afton to Fort Scott, with the exception of 30 minutes, as 4:00 to 10:15 in the afternoon from Fort Scott to Kansas City.

A. Yes sir.

Q. How can they be running along on two different Divisions at the same hour?

A. You asked me how long it took to make the run.

Q. From 4:30 in the afternoon to 10:15, the time that you gave me from Afton to Fort Scott, covers the same period of time

123 with the exception of 30 minutes, as from 4:00 to 10:15 from Fort Scott to Kansas City?

A. They are the same, but that is not what I understood you to say.

Q. Isn't it the same, with the exception of 30 minutes?

A. Yes sir.

Q. What sheet is that you have been reading from?

A. From Francis to Sapulpa.

Q. What is this you have down here?

A. A record of delays.

Q. You said a while ago in your direct examination the engine from Francis to Sapulpa was numbered 640?

A. Yes sir.

Q. You have three delays from Francis to Sapulpa, haven't you?

A. Yes sir, one at Francis, one at O. M. C., and another one 10 minutes picking up cars.

Q. In other words, two delays and two stations?

A. Two stations, Okmulgee and Francis.

Q. They were the same delays, weren't they?

A. Haven't checked that part of it up.

Q. State if you can check up and find the other delays. Have you anything there from which you can check?

A. I can show something about the time they stay at any station.

Q. Where are those sheets?

A. There they are.

Q. Now go to Weleetka.

A. 1:55 to 2:33, 38 minutes.

Q. What were you doing there 38 minutes?

A. It is not shown on the sheet, and I cannot testify to something I don't know anything about.

Q. There is a long delay there at Okmulgee, isn't there?

124 A. No sir, the total delay at Okmulgee is 50 minutes.

Q. Now, at Hamilton, how much delay?

A. That was a blind sider, and not any sheet to show. There was no telegraph office there at that time.

Q. Do you know the delay?

A. No sir, there is nothing here to show.

Q. Do you know how much delay there was between Sapulpa and Afton at the different stations?

A. No sir, no record to show that.

Q. But it does show here the delay of 38 minutes at Weleetka?

A. No accounting for it by the Conductor.

Q. And you don't know how many other delays, and if there is one at Hamilton you don't know anything about it?

A. It is not shown here, no sir. It is not a matter of record on the sheet, but I think I can explain it satisfactorily.

Q. Do you know without guessing?

A. I think so. Meets South bound train at Weleetka, 1:45 train got in.

Q. This train at Sherman, how much was the delay?

A. The record shows an hour, on account of the train getting in advance.

Q. How much delay was there? When did it reach there, and when did it get there?

A. Don't know when it arrived, have no record of it.

Q. You don't know that it reached Sherman about 3:15 in the morning?

A. Not to my own knowledge.

Q. Do you know when it left Sherman?

A. I have the train sheet to show for it.

Q. What time did it leave?

125 A. 5:10, I think. The record shows that.

Q. It doesn't show the arriving time?

A. The leaving time is 5:10.

Q. What was the cause of the delay?

A. They had to call the crew.

Q. Why did they have to be called?

A. Because the information we got from the other line was not correct.

Q. From your line at the other end?

A. The Frisco in Texas, another line.

Q. Who sent that information out?

A. The Despatcher at Fort Worth.

Q. Of the Frisco line?

A. Yes sir, at Texas.

Q. Do you know who the President of the Frisco road is in Texas?

A. Think Mr. Winchell had charge of it.

Q. Who was the President?

A. Mr. Winchell.

Q. Your road runs right across Red River into Texas?

A. Yes sir, over a leased track.

Q. The cattle went through on one bill of lading, didn't they?

A. Yes sir.

Redirect examination by H. W. BROADBENT:

Q. From that train sheet, Mr. Comstock, does that show the schedule time from Sherman to Francis?

A. Yes sir, it shows from 5:10 A. M. to 11:10 A. M. from Sherman to Francis.

Q. How many hours?

A. Six hours.

Q. Does it show the schedule time from Francis to Sapulpa?

A. Yes sir.

Q. Turn to that and say how many hours it is.

126 A. 5 hours and 5 minutes.

Q. From Francis to Sapulpa?

A. That is six hours and five minutes, I made a mistake.

Q. Beyond that you have no record?

A. No sir.

Recross-examination by J. B. THOMPSON:

Q. Do you know the distance from Sapulpa to Afton?

A. Think it is 90 miles.

Q. I wish you would look and see.

A. Yes sir, 90 miles.

Q. What did you give as the schedule time from Afton to Sapulpa?

A. 4 hours and 40 minutes.

Q. What mileage would that be in an hour?

A. 18:16 miles.
Q. Between 18 and 19 miles, schedule time?
A. Yes sir.

Witness excused.

D. W. ROUSNEY, after being first duly sworn on behalf of the Defendant testifies as follows:

Direct examination by H. W. BROADBENT:

Q. State your name.
A. D. W. Rousney.
Q. State what your official connection was with the Frisco during the month of May, 1909?
A. Stock yard foreman at Afton, Okla.
Q. Tell the jury what your duties were?
A. To unload cattle, feed and water them, and reload.
Q. Did you keep any records?
A. Yes sir.
Q. Will ask you to state whether or not you have any record of six cars of cattle billed through from Brady, Texas, to Kansas City, on or about the night of May 14th, 1909?
127 A. Yes sir.
Q. Turn to that record and refresh your memory.

Traversed by J. B. THOMPSON:

Q. Did you make that record yourself?
A. Yes sir, that is what I kept.
Q. Did you do the work yourself?
A. Yes sir, did it myself.

(Direct) by H. W. BROADBENT:

Q. Have you a record of that shipment?
A. Yes sir.
Q. And the car numbers?
A. Yes sir.
Q. I wish you would read the numbers.
A. 46810 S. F.; 4043 St. & S. B.; 49728 S. F.; 46419 S. F.; 76674 R. P.; 46788, no initials on that car.
Q. What did those cars contain?
A. Cattle.
Q. Was any one in charge of them?
A. Yes sir.
Q. Who was?
A. I don't know, but that gentlemen right there was in charge of them. (Pointing to Walter Shepherd.)
Q. When were those cars turned over to you to be unloaded?
A. 12:30 A. M. on the 15th.
Q. Tell the jury what you did in connection with your duties as feeder there.

A. I unloaded these cattle and fed and watered them, and reloaded them. I gave them three bales of hay and three barrels of water to the car, but we water and feed them at the dictation of the shipper when he is present. If he wants more we give them more. When no one is in charge of them, that is about the limit we
128 give them. This man being with them, I suppose we went according to his dictation.

Q. What does your record show?

A. I didn't keep any record of that. That is a contract, three bales of hay.

Q. Tell the jury the condition of those yards on that day, if you remember.

A. According to my record the yards were dry.

Q. Did you make a record of the condition at that time?

A. Yes sir.

Q. Answer the other question then.

A. According to my record they were dry.

Q. Tell the jury your facilities for feeding and watering cattle at that point at that time?

A. We have troughs about 12 feet long and 3 feet high for watering, and no racks to put the hay in, we take it and put it around the edge of the pen, scatter it out.

Cross-examination by J. B. THOMPSON:

Q. You say you are employed by the St. Louis & San Francisco R'y Co.?

A. Yes sir.

Q. How long?

A. Five years in this capacity.

Q. Work any before that?

A. Yes sir.

Q. In what capacity?

A. Mail and express man.

Q. How long at that?

A. Just about three years.

Q. You have been in the employ of the Company something like eight years?

A. Yes sir.

129 Q. Do you tell the jury that those pens were dry that day?

A. That is my record.

Q. Do you say they were?

A. No sir, I didn't say they were, but that is my record.

Q. You will not swear to it now?

A. I couldn't, my record shows that they were dry. I can't remember those things.

Q. You will not swear whether they were dry or not?

A. No sir.

Q. You didn't have any place to put the hay at that time, did you?

A. No sir.

Q. The hay was put around on the ground?
A. Yes sir, around the edge of the pen.
Q. The pen was about 80 x 120 feet, wasn't it?
A. I don't know just exactly what the size of the pens are, something in that neighborhood.
Q. This bunch of cattle filled those pens pretty full, didn't they?
A. Reasonably full.
Q. Now I will ask you, to refresh your memory, if the cattle didn't run through a mud hole there, and a whole bunch of them get into the mud?
A. I couldn't say about that, my record shows that the pens were dry.
Q. Didn't Mr. Shepherd complain about the pen at the time?
A. No sir, think not.
Q. In your presence?
A. Think not.
Q. You had an assistant there helping you, didn't you?
A. Yes sir.
Q. You didn't haul the water yourself?
130 A. Yes sir, I might have. I couldn't say about that. I usually do the work myself.
Q. Do you say at that time those troughs were off of the ground?
A. Yes sir, always were. Two are on the ground.
Q. Five troughs?
A. Yes sir.
Q. About 12 feet long?
A. Yes sir.
Q. And two were on the ground?
A. Yes sir.
Q. And you tell the jury three were off of the ground?
A. Yes sir, three feet off of the ground.
Q. At that time?
A. Yes sir.
Q. You are positive of that?
A. Yes sir.
Q. Didn't they have to be cleaned out with mud and trash at that time?
A. No sir.
Q. Do you remember whether you cleaned them out or not?
A. No sir.
Q. Do you remember whether you did the work or not?
A. Couldn't swear to that.
Q. Do you mean to tell this jury that they didn't have to be cleaned out?
A. I know of no reason for their being dirty.
Q. That is guess work, isn't it?
A. No sir, it is not.
Q. Haven't you worked there long enough to know?
A. I don't suppose they were dirty.

Q. Those pens are on the Main street of the town of
131 & 132 Afton, leading from the depot up in town, aren't they?
A. Yes sir, North of the railroad track and the depot is on the south side of the track.

Q. The Main street runs across between the depot and stock pens, doesn't it?

A. No sir, runs East side of the stock yard. The track runs between the depot and stock yard.

Q. I understand then that the main street of the town runs by the stock yard?

A. Yes sir, on the East side.

Q. Right where people pass going backwards and forwards?

A. Yes sir.

Counsel for the defense desires to introduce in evidence two depositions that were taken in Fort Worth.

Depositions Marked Exhibit "E"—Deft.

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133 *Answers and Depositions of the Witness R. Hanley, of Tarrant County, Texas.*

* * * * * * *

134 Direct examination.

By Mr. LOCKETT:

Q. State your name, age, residence and occupation, and also state your occupation during the month of May, 1909?

A. My name is R. Hanley; age 37; I live at 2250 Lipscomb Street, Ft. Worth, Tarrant County, Texas; am Clerk for Trainmaster F. B. Parker at present; occupied during May, 1909, as Train Dispatcher for the St. Louis San Francisco & Texas Railway Company.

Q. State whether or not you were on duty as train dispatcher during any part of the day of May 13, 1909, and if so, during what hours?

A. Yes, I was on duty from four o'clock until twelve o'clock midnight on May 13, 1909.

Q. This is a suit involving a shipment of cattle which moved out of Fort Worth on May 13, 1909, in train No. 30, over the St. Louis, San Francisco and Texas Railway. State whether or not you have in your possession any record or records showing the movement of said train No. 30 on said date.

A. Yes sir, I have the official train sheet, showing the movement of train No. 30, of May 13, 1909.

Q. State fully and particularly the character of the official train sheet alluded to by you, and by whom the entries therein were made and whether correctly made, and by whom and where the said train sheet has been kept since May 13, 1909.

A. The train sheet is the official record of the movement of all trains during a period of twenty-four hours. During this time three dispatchers, working eight hours each, are on duty continuously

during their hours of service, who make the records of trains
135 leaving or passing stations. These records are given to the dispatcher by the operators at the various stations, each dispatcher making his own entries during his eight hours. The records of trains on May 13, 1909, as noted by me, are correct. The train sheets are kept in the train master's office at Fort Worth.

Q. State whether or not all entries of the movements of trains between four o'clock p. m. and 12 o'clock midnight, of May 13, 1909, as shown in said train sheet, were correctly made by you.

A. Yes, sir, all records on train sheets for May 13, 1909, between the hours of four o'clock p. m. and twelve o'clock midnight of the same day were correctly made by me.

Q. If you can do so, attach such train sheet to your answers to these interrogatories. If you do not so attach such train sheet, then say why you do not do so, and attach a copy of the entries thereon showing the movements of any and all freight trains passing north from Fort Worth after four o'clock p. m. May 13, 1909, over the line of the St. Louis, San Francisco and Texas Railway Company, and if you cannot make such copy, then state how many of such freight trains left Fort Worth north bound, after four o'clock p. m. on said date, as shown by said train sheet, giving the number or designation of said train or trains and giving the hour or hours of departure from Fort Worth.

A. I cannot attach the train sheet of May 13, 1909, from the fact that it is an official record and always kept on file in the trainmaster's office. However, train No. 30, Engine 363, is the only freight train northbound leaving Fort Worth between the hours of four o'clock p. m. and twelve o'clock midnight on May 13,
136 1909. Train No 30, Engine No. 363, left West Yards at 6:15 p. m.; arrived at North Fort Worth at 6:45 p. m.; departed at 7:30 p. m.

Q. Did you, or not, have any conversation or dealing with reference to the shipments of cattle involved in this suit with the shippers, J. C. Mills and R. L. Burnett, or anyone of them?

A. No, sir.

Cross-examination.

By Mr. THOMPSON:

Q. How long have you been in the employ of the defendant Company?

A. Six years.

Q. At what place?

A. Five years at Ft. Worth and one year on the line at various stations.

Q. In what capacities?

A. The year on the line was as operator, and in Fort Worth about three years as dispatcher and two years as clerk to train master.

Q. How many times have you been a witness for the defendant company during the time you have been in its employ?

A. This is the first time I remember of.

Q. Never testified for the Company before?

A. No sir,—one time there was a Western Union case in which I testified. This is the only time for the Frisco.

Q. Only time for the Frisco.

A. Yes sir.

Q. Do you know what time of day the cattle in controversy in this suit were loaded at Ft. Worth?

A. My train sheet shows they were loaded at 6:30 p. m.

Q. At six thirty?

137 A. Yes, sir.

Q. Your train sheet also shows that they left Ft. Worth at 6:15?

A. West Yards, yes sir.

Q. Then they were loaded, according to your train sheet; they left West Yards, according to your train sheet, before they were loaded—fifteen minutes?

A. Yes, sir.

Q. Will you please explain how that would be possible, how they could leave here before they were loaded?

A. The train crew is ordered out and leaves West Yards, which is a distance of about three miles south of North Ft. Worth, and the stock in question, as I understand it, were loaded at North Ft. Worth.

Q. Then, when you testified a while ago that your train sheet showed that the stock left West Yards at 6:15, that, so far as that part of the showing of the sheet is concerned, is incorrect?

A. No sir, that was not the question. You were speaking of the train, the stock were not mentioned at all.

Q. As a matter of fact, the cattle were not in the train when it left West Ft. Worth?

A. No sir, they were not.

Q. Now, do you know how long the cattle had been loaded in North Ft. Worth before this train crew that left West Ft. Worth came on and took them up?

A. Nothing more than the record which is given us shows, which is that they were loaded at 6:30 p. m.,—noted on the train sheet.

Q. That means that they went into the train at that time?

A. No sir, loaded on the cars at that time.

138 & 139 Q. You do not know whether that is correct or not?

A. That is the information as given us.

Q. It is merely hearsay, so far as you are concerned?

A. Yes, sir.

Q. You do not know whether these cattle had been standing there on the cars three or four hours, or not, do you?

A. No, sir.

Q. Do you know the distance from Ft. Worth to Kansas City over the Frisco?

A. No sir, not exactly.

Q. Have you a sheet or map showing the mileage, that you could take and tell us exactly the mileage?

A. Yes, sir; I could look it up in the official railroad guide—that gives it.

Q. Have you one here, so you could refer to it?

A. No sir, I have not.

Redirect examination.

By Mr. LOCKETT:

Q. You have testified that train No. 30 left West Yards at 6:15 p. m. on May 13, 1909, and left North Ft. Worth at 7:30. State where the cattle in question were picked up by said train No. 30 or placed in said train?

A. The stock in question were placed in train No. 30 at North Ft. Worth.

R. HANLEY.

Subscribed and sworn to before me by R. Hanley this 2nd day of July, A. D. 1910.

[SEAL.] H. T. COOPER,
Notary Public in and for Tarrant County, Texas.

My commission expires May 31, 1911.

* * * * * * *

140 *Answers and Depositions of the Witness W. E. Welch, of Tarrant County, Texas.*

* * * * * * *

141 Direct examination.

By Mr. LOCKETT:

Q. State your name, age, residence and occupation, and state also what your occupation was on May 13, 1909?

A. My name is W. E. Welch; am 30 years old; occupation freight agent; residence, 1029 Travis Avenue, Fort Worth, Texas; I was freight agent on May 13, 1909.

Q. This is a suit for damages alleged to have been suffered by six cars of cattle moving from North Fort Worth, Texas, to Kansas City, Missouri, over the lines of the Fort Worth and Rio Grande Railway Company, St. Louis, San Francisco and Texas Railway Company, and the St. Louis & San Francisco Railroad Company; three cars being shipped in the name of R. L. Burnett, in cars Nos. 76674 C., R. I. & P., No. 46419 S. L. & S. F. and 46788 S. L. & S. F. and three cars in the name of J. C. Mills in cars No. 46810 S. L. & S. F. No. 49728 S. L. & S. F. and 4043 T. & B. V. State whether or not you have in your custody, as local freight agent at Ft. Worth, any record of said shipments of cattle?

A. Yes sir, my record shows these cattle received from the Belt Railway Company at 7:00 p. m.

Q. Shows these cattle received from the Belt Railway Company?

A. From the Belt Railway, May 13, 1909.

Q. Does your record show any further fact in regard to these cattle?

A. No, we seemed to make no exceptions to them.

Q. Does it show into what train they were placed?

A. Train Extra 363.

Q. That is the engine number?

A. Engine 363; Train No. 30 Conductor G. Moss.

142 Q. At what hour did said train leave the station of North Ft. Worth?

A. My records show that it left there at 7:30 p. m., May 13.

Q. State whether or not the Ft. Worth and Rio Grande Railway Company or the St. Louis, San Francisco and Texas Railway Company or the St. Louis & San Francisco Railroad Company has any line of track extending to the stock yards of the Ft. Worth Stock Yards Company?

A. They have not.

Q. State, if you know, how far it is from the stock yards of the Fort Worth Stock Yards Company to the nearest switch or track of either the Fort Worth and Rio Grande Railway Company or the St. Louis, San Francisco and Texas Railway Company or the St. Louis and San Francisco Railroad Company?

A. It is somewhere near a mile and a quarter, as the track is laid out.

Q. State what, if any, line of railway has a track extending to the Stock Yards of the Fort Worth Stock Yards Company?

A. The Fort Worth Belt Railway.

Q. Has any other railway company besides the Ft. Worth Belt Railway Company a line of track to the Ft. Worth Stock Yards Company's yard?

A. No, sir.

Q. In your answer to a previous interrogatory you have said you received the cattle involved in this suit from the Belt Railway Company at 7:00 p. m. State what is the full name of the Belt Railway mentioned?

A. The Fort Worth Belt Railway Company.

Q. State whether or not said cattle, when received by you from the Ft. Worth Belt Railway Company were loaded in the cars?

143 A. Yes, sir, my records show that the cattle covered by the waybills in question were loaded into those cars.

Q. In the cars numbered as given in the interrogatory?

A. That they were covered by Brady to Kansas City way bills 32 to 37, inclusive. I do not know who owned the cattle. They often change hands in those yards and go out under different names altogether.

Q. The waybills were 32 to 37, inclusive.

A. Waybills 32 to 37 went out in those cars; so far as the ownership of the cattle is concerned, I did not look that up.

Q. What character of contract for the shipment of live stock are you required to make?

Mr. THOMPSON: That is objected to as incompetent, irrelevant

and immaterial, and as being that if he was required to make any particular kind of contract it was not binding on the plaintiff in this case. The question is, what kind of a contract he did make and not what kind he is required to make.

A. What kind of a contract?

Q. Yes sir.

A. We only have one form of contract.

Q. I mean with reference to its being verbal or written; oral or written contract?

A. We just fill in the space there; it is a printed contract; we fill in the writing in the contract.

Q. State whether or not you have any authority to ship cattle under a verbal contract.

A. These contracts we make there in order for the man in charge of the cattle to go along, you know. He comes down and the
144 shipper says, "Give the man a contract in charge of this stock," and gives authority for him to sign the contract with the company.

Q. You say a written contract?

A. Yes, sir.

Q. State whether or not you had any conversation or dealing of any sort, other than as evidenced by the written contracts covering the shipment, with the shippers of cattle involved in this suit?

A. None whatever.

Q. State whether or not you made any representations or promises to the shippers respecting the time that would be consumed in moving the shipment of cattle involved in this suit, or any promise that any particular market would be made with said shipments?

Mr. THOMPSON: Objected to because it is not an issue in this case.

A. I did not.

Q. The cattle involved in this suit originally moved from Brady, Texas to Ft. Worth, Texas, did they not?

A. They are supposed to be the same cattle.

Q. Moved out under the same waybill?

A. They were represented to us as the same cattle, whether or not they were, I cannot say.

Cross-examination.

By Mr. THOMPSON:

Q. How long have you been in the employ of the defendant company, Mr. Welch?

A. About four or five years.

Q. In what capacity?

A. Freight agent.

145 Q. Prior to that time what was your occupation?

A. I was with the Cotton Belt; Cashier for the Cotton Belt.

Q. Been in the railroad business how long?

A. About fifteen years.

Q. How many times have you testified for the St. Louis and San Francisco Railroad Company since you have been in its employ?

A. A couple of times, I guess.
Q. In reference to live stock shipments?
A. One live stock shipment.
Q. What was the other time?
A. About a piano shipment, or organs rather.
Q. The Fort Worth Belt Railroad Company—is that a connecting carrier with the Fort Worth and Rio Grande Railway Company and St. Louis and San Francisco Railroad Company?
A. It is the line that handles the business from our connection to the stock yards. I guess you would call it a connecting line.
Q. Does it issue any extra bill of lading?
A. We give them a bill just as any other railroad company gives a bill to us in getting a shipment from some other connection with our road; it is all the same.
Q. This shipment of cattle originated at Brady, Texas, as I understand it. There was a bill of lading issued from Brady to Kansas City, wasn't there?
A. To North Fort Worth, I suppose.
Q. What kind of an arrangement—if these cattle are unloaded at Ft. Worth, stop at Ft. Worth, and do not find a satisfactory market, and the shipper wants to ship the cattle on from Ft. Worth to
146 Kansas City, what kind of an arrangement do you have with them?
A. He is supposed to show me his contract and make written request for reconsignment of these cattle within forty-eight hours; with the privilege of this market, the shipper to stand all the expense—extra expense, you know, on account of the extra service performed here.
Q. In other words, it is a contract that gives them an option, if they desire to do so, to have the cattle forwarded on through, with stop-over privilege at Ft. Worth?
A. Yes, sir, there are provisions for that in the tariff.
Q. When cattle are consigned from Brady, Texas, to Ft. Worth, over the Ft. Worth & Rio Grande—that is one branch of the Frisco, as I understand it, and operated by the same employes?

Mr. LOCKETT: We object to that; it would be hearsay and the matter is not within the knowledge of the witness; it is immaterial, irrelevant and not an issue in the case.

A. So far as I know, I am not in a position to say whether it is a part of the Frisco or not.
Q. Do you work for both companies?
A. I work for both companies.
Q. Do they pay you separately?
A. The Cotton Belt pays me.
Q. The Cotton Belt?
A. Yes sir.
Q. What company do you work for besides the Cotton Belt?
A. The Cotton Belt pays me altogether. I work strictly for the Cotton Belt.
Q. You are not agent for the defendant company.

147 Mr. LOCKETT:

Q. What Company are you agent for?
A. For the Frisco and St. Louis Southwestern Ry. Co. of Texas.
Q. Do you mean that there is any such company as the Frisco.
A. Frisco of Texas, Rio Grande and Cotton Belt.
Q. Give the Companies' names.

Mr. THOMPSON resumed:

Q. You have not been in the employ then of the St. Louis & San Francisco Railroad Company of Texas for four years?
A. I have been joint agent about that long.
Q. Do you have anything to do with the Ft. Worth and Rio Grande Railroad Company; did you ever hear about that road?
A. I have worked for them once upon a time. I handle their business, but I am not working for them.
Q. Mr. Welch, a consignment of live stock having its point of origin on the defendant; that is, the St. Louis and San Francisco Railroad Company's line,—consigned to the Stock Yards at Fort Worth, suppose it had its point of origin at Ada, Oklahoma, where would it be delivered when it reached Ft. Worth?
A. It would be delivered to the Ft. Worth Belt Railway.
Q. Where would it be transported by the Fort Worth Belt Railway Company?
A. From our connection to the Ft. Worth Stock Yards Company.
Q. Is that done on the one bill of lading, the one that is issued at Ada?
A. Yes sir, there is no other bill of lading taken out, as I know of; it would move on the one bill of lading.
Q. And that one bill of lading does not contain the name of the Ft. Worth Belt Railway Company as one of the connecting
148 carriers, does it?
A. I hardly think so; I do not remember of ever seeing one.
Q. Have you got a copy of the ordinary bill of lading that they use on the defendant's line?
A. On the St. Louis & San Francisco Railroad?
Q. Yes sir.
A. Live stock contract?
Q. Yes sir.
A. I have no contracts issued by the St. Louis & San Francisco Railroad Company at all.
Q. But you do know, Mr. Welch, as a matter of fact, that shipments of live stock having origin on the defendant St. Louis & San Francisco Railroad Company's line of railroad, consigned to some commission house here at Fort Worth, or North Fort Worth, are moved on that bill of lading from the point of origin to the point of destination, and that the Fort Worth Belt Railway Company is not named in that bill of lading, don't you?
A. I never did see one of their bills of lading and can't say whether it would include the name of that company or not.
Q. Explain that?

A. I never saw a bill of lading of the St. Louis & San Francisco Railroad Company.

Q. You have been in their employ how long?

A. About four years; the St. Louis, San Francisco and Texas Ry. Co. I speak of.

Q. You said a while ago that you had made written contracts with people for the shipment of live stock.

A. I make the contracts for the St. Louis, San Francisco and Texas Railway Company.

Q. How do they ship cattle from here to Kansas City on the St. Louis and San Francisco Railroad Company of Texas.

149 A. They turn it over to the Frisco where the junction point is.

Q. You only make one contract for the shipment from here to Kansas City?

A. At times the shipment is made only to the junction with the Frisco proper, that is, according to the instructions given at the time.

Q. Have you got a copy here of the contract, shipping contract, that was executed covering the shipment in this case; have you got copies of them here now?

A. That would be in Mr. Tillman's office; I do not keep them in my office.

Q. Look at these (hands witness papers), and see if you can identify them as copies?

A. One is supposed to be an original and one to be a copy.

Q. Were the cattle in this shipment moved from the Fort Worth Stock Yards to Kansas City on these contracts?

A. They left here on these contracts; I do not know whether any others were executed at Sherman or the State line or not.

Q. This is a Kansas City contract?

A. It is supposed to be.

Q. Any way, they were moved from the stock yards on it?

A. They were moved from our connection on it.

Q. How are they moved from the Stock Yards down to your connection.

A. On phone instructions from my office.

Q. On phone instructions from your office?

A. Yes sir.

Q. That part of the matter was verbal?

A. So far as our getting them to our connection from the Stock Yards.

150 Q. Who paid the Ft. Worth Belt Railway for moving them?

A. The shippers.

Q. How did they pay it; did they pay it direct, or did you collect it and pay the Belt?

A. I billed it against the shipment and they paid it at Kansas City; I suppose that is where we billed the charges to.

Q. The Belt Railway Company is not known in that contract?

A. Not so far as I know, I do not see any mention of it in here.

Q. The handling by the Belt Line is entirely between your company and the Belt Line; the shipper had nothing to do with that, did he?

A. It is a matter of transporting the cattle from the Stock Yards to our connection; we could not get them unless the Belt Line delivered them to us.

Q. But this is a matter between your company and the Belt Line; the shipper did not have anything to do with that, did he?

A. I guess not.

Q. Do you know what time that day, on the 13th, that these cattle were loaded and carried over by the Belt Line under your instructions?

A. I have got the record in my office; I did not look it up.

Q. You phoned over and had them loaded, didn't you?

A. Yes, sir.

Q. Did you have them loaded three or four hours before you moved them from the stock yards; in other words, about three o'clock?

A. I really don't know unless I looked it up.

Q. Did you do the phoning yourself?

A. I do not remember whether I did or not. Sometimes
151 these cattle are marked loaded really before they are loaded over there, in lots of cases. We take the Stock Yards' word for it as to when it is actually loaded.

Q. Do you know the distance from Ft. Worth to Kansas City?

A. No sir.

Q. You don't know your own road's mileage?

A. No, sir.

Redirect examination.

By Mr. LOCKETT:

Q. Are you in any way employed by, or do you in any way represent the St. Louis & San Francisco Railroad Company?

A. I do not; no, sir.

Q. State the names of all the railroads to which you report or which you in any way represent?

A. The St. Louis Southwestern Railway Company of Texas, St. Louis, San Francisco and Texas Railway Company and the Fort Worth and Rio Grande Railway Company.

Q. You were asked in regard to this privilege of reconsignment to Kansas City of shipments originating at Brady, the original billing to North Fort Worth Stock Yards. State whether or not that arrangement is a matter of special contract with reference to a particular shipment, or whether it is covered by tariff duly filed?

A. It is covered by tariff duly filed and in force.

Q. Was not necessary for the shipper when he made original shipment from Brady to make known in any way or have any agreement to the effect that he may desire to reconsign the shipment, at the time he makes the shipment?

A. I really think it is hardly necessary for him to make it known that he is going to divert the cattle.

152 Q. The tariff provides that he may reconsign them within forty-eight hours?

A. Yes sir, whether the billing reads the privilege or not; if the stock has not in any way been disturbed.

Q. Do you know anything about the handling of these cattle prior to the time you received the same from the Ft. Worth Belt Railway Company, at seven o'clock p. m., May 13, 1909?

A. No, only our records show that from the Rio Grande they went to the Ft. Worth Belt Railway Company. I have record on the cattle incoming on the Rio Grande and delivered to the Ft. Worth Belt Railway Company.

Q. Do I understand you, then, to mean that these cattle were received from Brady and delivered to the Belt for transportation to the stock yards. You have no further knowledge of their handling until they were again received by you from the Belt at seven o'clock p. m. May 13, 1909?

A. That is my first record of handling the shipment.

Q. Were you, on May 13, 1909, in the employ of, or in any way agent or representative of, the St. Louis & San Francisco Railroad Company?

A. No sir.

Recross-examination.

By Mr. THOMPSON:

Q. Who is president of the St. Louis and San Francisco Railroad Co.?

A. I declare I don't know who it is.

Q. Do you know who the president of the St. Louis & San Francisco Railroad Company of Texas is?

A. The Vice-President is Mr. Drake.

Q. I am not asking about that. Who is the president of the St. Louis & San Francisco Railroad Company of Texas?

153 A. Mr. Winchell, I believe.

Q. Who is president of the Fort Worth and Rio Grande Railway Company?

A. Mr. Winchell, also, I believe.

Q. Do you know, also, whether Mr. Winchell is president of the St. Louis & San Francisco Railroad Company?

A. I cannot say.

Q. Who is General Superintendent of the St. Louis and San Francisco Railroad Company?

A. General Superintendent?

Q. Yes sir.

A. Of the St. Louis & San Francisco Railroad Company?

Q. Yes sir.

A. Mr. Gray, I believe.—C. R. Gray.

Q. Who is General Superintendent of the St. Louis, San Francisco and Texas Railway Company?

A. W. B. Drake.

Q. Who is General Superintendent of the Ft. Worth and Rio Grande Railway Company?

A. Mr. Drake is vice president and general superintendent.

Q. Who is General Manager of the St. Louis & San Francisco Railroad Company?

A. Mr. Winchell, I believe.

Q. Who is General Manager of the St. Louis & San Francisco Railroad Company of Texas?

A. Mr. Winchell, also, I believe.

Q. Who is General Manager of the Fort Worth and Rio Grande Railway Company?

A. They have no general manager; they have a vice president and general superintendent.

154 Q. They have no general manager?

A. So far as I know, they have not.

Q. Those three different companies—who is the city—who is the passenger agent, the ticket agent, here at Ft. Worth, for those three different lines?

A. For the Frisco of Texas and the Ft. Worth and Rio Grande, Mr. Mitchell is ticket agent.

Q. Who is their freight agent?

A. General or local?

Q. Both.

A. Littlefair is the local freight agent on the other side, and Mr. Preston is general freight agent.

Q. Where do they keep their offices?

A. Mr. Preston's office is in this building (Wheat Bldg.).

Q. Do they all office together?

A. No, sir.

Q. What I mean, is, do the St. Louis & San Francisco Railroad Company and St. Louis & San Francisco Railroad Company of Texas and Ft. Worth and Rio Grande Railway Company all have their offices together?

A. No sir.

Q. The Ft. Worth and Rio Grande Railway Company and the St. Louis and San Francisco Railroad Company have separate offices?

A. The St. Louis and San Francisco Railroad Company, as I understand, has no offices here at all.

Q. The other two have their offices together?

A. The St. Louis, San Francisco and Texas Railway Company and the Ft. Worth and Rio Grande Railway Company have offices together.

Q. The same officers of one are officers of the other in like capacity?

155–157 A. The Ft. Worth & Rio Grande Ry. Co. and the St. Louis, San Francisco and Texas Ry. Co., all the same.

Q. The St. L. & S. F. R. R. Co. of Texas, do you know where it stops?

A. At the State line.

Q. Middle of Red River?

A. Middle of Red River.

Q. Have they any station in the middle of Red River, where they

stop the St. L., S. F. & Texas Ry. and start the St. Louis & S. F. R. R.?

A. I don't know about that.

Redirect examination:

Q. Are any of those gentlemen named by you, Mr. Drake, Mr. Littlefair, Mr. Preston, or Mr. Mitchell, so far as you know, in any way employed, by, or agents or representatives of, the St. Louis and San Francisco Railroad Company?

A. So far as I know, they haven't a thing to do with the St. Louis & San Francisco Railroad Company.

W. E. WELCH.

Subscribed and sworn to before me by W. E. Welch this 2nd day of July, A. D. 1910.

H. T. COOPER.
Notary Public in and for Tarrant County, Texas.

My commission expires May 31, 1911.

* * * * * * *

158-172 STATE OF OKLAHOMA,
County of Murray, sct:

In the County Court for the County of Murray, in the State of Oklahoma.

H. B. SHEPHERD
vs.
ST. L. & S. F. R. R. Co.

It is agreed that the cattle involved in this suit moved from North Fort Worth, Texas, under the attached contracts executed by the Fort Worth & Rio Grande Railway Company and R. L. Burnett for three cars and by said Railway Company and J. C. Mills for three cars, the Burnett contract being the original contract executed and the Mills contract being a carbon of the original; and that the cars containing said cattle moved from North Fort Worth in train No. 30, Engine 363, over the line of the St. Louis, San Francisco & Texas Railway Company; Provided, that this agreement shall not be construed as a waiver of the contention on the part of the plaintiff that the shipment was made from the stock yards at Fort Worth, Texas to Kansas City, Mo., on these contracts.

J. B. MONET,
Att'y for Plaintiff.
J. L. LOCKETT, JR.,
Att'y for Defendant.

* * * * * * *

173 This was all the evidence had and introduced on the trial of said cause.

174 Copy.

In the County Court of Murray County, Oklahoma.

H. B. SHEPHERD, Pl't'ff,
vs.
ST. LOUIS & SAN FRANCISCO RY. CO., D'f'd't.

Demurrer.

Comes now the Defendant herein and demurs to the evidence of the Plaintiff introduced in this cause for the reason that said evidence does not prove a cause of action against the Defendant.

EMANUEL & BROADBENT,
Att'ys for D'f'd't.

Endorsed on back: No. 290. H. B. Shepherd vs. St. Louis & San Francisco R. R. Co. Demurrer. Taxed. Filed Oct. 17, 1910. Harry W. Fielding, County Judge.

175 Thereafter, and on the same day, to-wit October 17th, at the conclusion of all the evidence in said case, the Court instructed the jury as follows:

176 STATE OF OKLAHOMA,
Murray County:

In County Court.

H. B. SHEPHERD,
vs.
ST. LOUIS & SAN FRANCISCO RAILWAY CO.

Charge of the Court.

1.

Gentlemen of the Jury, this is an action instituted by H. B. Shepherd, Plaintiff, against St. Louis & San Francisco Railway Company, Defendant, to recover certain damages alleged to have occurred in the shipment of six car load- of cattle from Fort Worth, Texas, over the line of the Defendant Railway Company, to Kansas City, Missouri.

Plaintiff alleges that said Railway Company failed to transport said cattle with due diligence and without unnecessary delay, and that by reason thereof said cattle failed to arrive at said Kansas City on Saturday, the 15th day of May, 1909, in time for market of said date, but on account of said negligent transportation, said cattle did not reach said destination until the afternoon of May 16th, 1909.

Plaintiff further alleges that on account of the failure of Defendant to transport said cattle with due diligence, said cattle shrunk forty pounds per head, or a total of 6,640 pounds, whereby Plaintiff was damaged in the sum of $335.32, and further alleges that by reason of the delay in transporting said cattle, as alleged, the price of said cattle declined 40% per hundredweight from the market on Saturday, the 15th of May, 1909, when the plaintiff alleges said cattle should have arrived, and that by reason
177 thereof plaintiff was damaged in the further sum of $505.88, and further alleges that by reason of the negligence on the part of the defendant in transporting said cattle, it became necessary to unload and feed the same in transit, and that by reason thereof plaintiff was charged the sum of $21.00, for all of which said items, he prays judgment.

Defendant on its part denies that there was any unreasonable delay on its part in the shipment of said cattle after the same were delivered to it, and denies that it undertook to transport said cattle to Kansas City within a specified time, and alleges that it transported said cattle with reasonable speed and diligence, and that by reason thereof it is not liable to the plaintiff in said damages, or any part thereof.

2.

You are instructed that if you believe from the evidence in this case that plaintiff, H. B. Shepherd, acting through his agent, Walter Shepherd, delivered to the Defendant through its connecting carrier 166 head of cattle on the 13th day of May, 1909, and by use of ordinary care and diligence on the part of the agents, servants or employees of the Defendant Company said cattle could have been transported from Fort Worth, Texas, to Kansas City, Missouri, in time for the market on Saturday, May 15th, 1909, but that on account of the negligence of the agents, servants and employees of the Defendant Company said cattle were not so transported and delivered at Kansas City in time for the market on the 15th day of May, 1909, then your verdict should be for the plaintiff in this case, and in arriving at the amount of damages, if any, which plaintiff sustained, you will take into consideration the depreciation, if any, in the market value of the cattle in controversy from the 15th day of May, 1909, to the 17th day of May, 1909, and the loss of weight, if any, occasioned by such delay, and these
178 items, together with whatever expenditure the plaintiff was required and put to by reason of purchasing food for said cattle by reason of such delay, if you find there was a delay, will constitute the amount or measurement of plaintiff's recovery.

Excepted to by Emanuel & Broadbent, Att'ys for Defendant.

3.

You are instructed that the Defendant Company will not be liable to plaintiff for any delay to said shipment while on the line of the Fort Worth & Rio Grade Railway Company.

Excepted to by Emanuel & Broadbent, Att'ys for Defendant.

4.

You are instructed that if you find from the evidence that the St. Louis & San Francisco Railway Company received said shipment of cattle from connecting lines at some point in Texas, and that thereafter it had control and management of the train in which said cattle were shipped, the defendant would be liable for damages, if any, which occurred thereafter by reason of any unnecessary or unreasonable delay in transportation, if you find there was such, even though you should find as a fact that the track over which said Defendant operated said train did not belong to it, but to some other Railway Company.

Excepted to by Emanuel & Broadbent, Att'ys for Defendant.

5.

You are instructed that the St. Louis & San Francisco Railway Company cannot be liable in this case for any negligent delay in transportation of said cattle occurring beyond the points
179 where it received said cattle and took charge of same for shipment to Kansas City, whatever delay there might have been prior thereto.

Therefore, if you find and believe from the evidence that the Defendant carried and conveyed said cattle with reasonable speed and diligence after said cattle were delivered to it, then it cannot be held liable in this action, and you should return a verdict for the Defendant.

6.

You are instructed that the St. Louis & San Francisco Railway Company could not be liable in this action for any delay occasioned by any connecting carrier before it received the shipment of said cattle, but can only be liable for such unreasonable and unnecessary delay of such cattle after it received them.

7.

You are instructed that under the laws of the United States, the defendant Company could not keep the stock in this shipment in the cars longer than thirty-six hours, and if you find from the evidence that it was not reasonably possible that the shipment should reach Kansas City within the thirty-six hour limit, then it is not liable for the delay caused by the unloading of the stock at Afton.

8.

You are the sole judges of the credibility of the witnesses, and of the weight of the evidence, and of the facts. It is your right to determine from the demeanor of the witness on the stand their means of testifying, their apparent candor or frankness, or the lack thereof, their apparent intelligence, or their interest, if any, in the result of this suit, their temper or bias, if any has been shown, their means of information and the reasonableness
180 of the story told by them, and to give weight accordingly. You have a right to believe all of the testimony of a witness,

or believe it in part and disbelieve it in part, or you may reject it altogether, as you find the evidence to be. You are to believe as Jurors what you would believe as men, and there is no rule of law which requires you to believe as a Juror what you would not believe as men.

9.

The burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence all material allegations in this complaint.

10.

You are instructed that any five of your number may return a verdict either for the plaintiff or the defendant. In the event a verdict is returned by five of your number only, it will be necessary for each of the five Jurors concurring therein to sign the verdict individually. If, however, you return a verdict unanimously, it will be necessary for your Foreman only to sign it.

HARRY W. FIELDING,
County Judge.

181 The following instructions were requested by the defendant and refused by the Court, to which ruling of the Court the defendant then and there duly excepted. Said requested instructions, so refused, are in words and figures as follows, to-wit:

182 Copy.

H. B. SHEPHERD
vs.
ST. LOUIS & SAN FRANCISCO RY. CO.

Defendant moves the Court to instruct the jury as follows:
GENTLEMEN OF THE JURY: You are instructed to return a verdict for the Defendant.

EMANUEL & BROADBENT,
Att'ys for D'f'd't.

Endorsed on back: H. B. Shepherd vs. Frisco. Motion for directed verdict. Taxed. Overruled. Harry W. Fielding, County Judge. Filed Oct. 17th, 1910. Harry W. Fielding, County Judge.

183 And thereafter, and on the 17th day of October, 1910, the jury returned into open court their verdict in the above entitled case, which verdict is in words and figures as follows, to-wit:

184 Copy.

STATE OF OKLAHOMA,
County of Murray, ss:

In County Court.

Case No. —.

H. B. SHEPHERD, Plaintiff,
vs.
ST. LOUIS AND SAN FRANCISCO RAILROAD CO., Defendant.

Verdict.

We, the jury, empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, find for the plaintiff H. B. Shepherd and assess his damages at the sum of $700.00 *Seven hundred.*

C. N. HILTON, *Foreman.*

Endorsed on back: No. 290. Docket —, Page —. Verdict civil. H. B. Shepherd, Plaintiff, vs. St. Louis and San Francisco Railroad Company, Defendant. Taxed. Returned into Court and filed this — day of ——, 191—. Filed Oct. 17, 1910. By Harry W. Fielding, County Judge.

185 And thereafter, and on the 17th day of October, 1910, the Hon. Harry W. Fielding, Judge of said Court, entered the following journal entry of judgment, which is in words and figures as follows, to-wit:

186 Copy.

In the County Court of Murray County, State of Oklahoma.

H. B. SHEPHERD, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Journal Entry.

Now on this 17th day of October 1910 the same being one of the regular days of the October 1910 term of the County Court within and for Murray County, State of Oklahoma, come on to be heard on regular call of the docket the above entitled cause:

Thereupon both the Plaintiff and Defendant appeared in Court and announced ready for trial. A jury composed of C. N. Hilton and five other lawful men were thereupon duly selected, empaneled and sworn to try the cause, and the cause was thereupon submitted to the jury, and after hearing the evidence, the charge of the Court

and argument of counsel, the jury retired and after deliberation, returned into Court the following verdict, to-wit:

"We the jury, empaneled and sworn to try the issues in the above entitled cause, do, upon our oaths find for the plaintiff H. B. Shepherd and assess his damages at the sum of $700.00 *Seven Hundred.*

C. N. HILTON, *Foreman.*"

187 Wherefore, it is considered, ordered, adjudged, and decreed by the Court that the Plaintiff, H. B. Shepherd, do have and recover of the Defendant, the St. Louis and San Francisco Railroad Company, the sum of Seven Hundred ($700.00) Dollars, together with all costs laid out and expended, for which let execution issue at the request of the plaintiff.

HARRY W. FIELDING,
County Judge of Murray Co., Okla.

Endorsed on back: No. 290. H. B. Shepherd, Plaintiff, vs. St. Louis and San Francisco Railroad Co., Defendant. Taxed. Journal Entry. Filed Oct. 28, 1910. Harry W. Fielding, County Judge. Thompson & Patterson, Pauls Valley, Oklahoma, Attorneys for Plaintiff. Recorded in the Civil Journal, Vol. 1, Page 446.

188 And thereafter, and on the 19th day of October, 1910, defendant duly filed its motion for new trial in the above entitled cause, which said motion for new trial is in words and figures as follows, to-wit:

189 In the County Court in and for Murray County, Oklahoma.

H. B. SHEPHERD, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO R. R. CO., Defendant.

Motion for New Trial.

Comes now the St. Louis & San Francisco Railroad Company, defendant herein and respectfully moves the Court to set aside the verdict rendered in the above cause on October 17th and grant a new trial of the issues herein, for the following reasons, to-wit:

First. For the reason that the damages are excessive and appear to have been given under the influence of passion or prejudice.

Second. That the verdict is not sustained by sufficient evidence and is contrary to law.

Third. For errors of law occurring at the trial and excepted to by the defendant herein.

Respectfully submitted,

R. A. KLEINSCHMIDT &
H. W. BROADBENT,
Attorneys for Defendant.

Endorsed on back: No. 290. H. B. Shepherd vs. The St. Louis & San Francisco R. R. Co. Motion for new trial. Taxed. Filed Oct. 19, 1910. Harry Fielding, County Judge.

190 And thereafter, to-wit: on the 27th day of February, 1911, said motion for new trial coming on regularly to be heard, same was by the court overruled, to which ruling of the court, defendant then and there excepted. Journal Entry overruling motion for new trial is in words and figures as follows, to-wit:

191 *Journal Entry Overruling Motion for New Trial.*

H. B. SHEPHERD, Plaintiff,
vs.
ST. L. & S. F. RY. CO., Defendant.

On this the 27th day of February, 1911, came on regularly to be heard the above entitled cause upon a motion for new trial by defendant. Both parties appearing by their attorneys of record announced ready. And the Court having heard the argument of counsel and being sufficiently advised in the premises doth overrule said motion, to which action of the Court in overruling said motion the defendant then and there in open court duly excepted. And prayed and there was granted 90 days to make and serve said casemade, 10 days for plaintiff to suggest amendments and 5 days to settle same.

It is therefore ordered, adjudged and decreed by the court that the said motion for new trial be and the same is hereby overruled.

It is further ordered that a bond on appeal in the sum of $1,400.00 with good and sufficient sureties to be approved by the court be filed in 15 days from the date hereof.

HARRY W. FIELDING.
County Judge.

192–197 And thereafter, and on the 11th day of March, 1911, defendant filed its supersedeas bond in said case, duly executed and approved, in the sum of $1,500.00, which said supersedeas bond is in words and figures as follows, to-wit:

* * * * * * *

198 & 199 STATE OF OKLAHOMA,
County of Murray, ss:

In the County Court in and for said County and State.

H. B. SHEPHERD, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Certificate of Trial Judge.

This is to certify that the foregoing above casemade and the amendments thereto have been duly served in due time, and the

amendments thereto suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such cause; and I hereby settle, allow and certify and sign the same as true and correct and hereby order that the Clerk of the County Court attest the same with the seal of said Court, and file the same of record.

Witness my hand at Sulphur, Murray County, Oklahoma, this the 31" day of May, 1911.

HARRY W. FIELDING,
County Judge.

Attest:
C. E. EASTERLING,
[SEAL.] *Clerk of the County Court.*

* * * * * * *

200 Supreme Court, September Term, 1913, September 11, 1913
Third Judicial Day.

No. 2978.

ST. L. & S. F. RY. CO., Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

And now on this day the above cause is submitted, and it is ordered by the court that plaintiff in error be allowed to file reply brief.

201 Supreme Court, September Term, 1913, December 9th, 1913.
Thirty-fourth Judicial Day.

No. 2978.

ST. L. & S. F. RY. CO., Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

And now on this day the above cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Turner, J.

All the Justices concur.

202 In the Supreme Court of the State of Oklahoma.

No. 2978.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

(Filed December 9th, 1913.) W. H. Campbell, Clerk.

(1) If in a common law action to recover damages for the breach of a shipping contract, whereby defendant undertook to safely transport certain cattle within a reasonable time, it is shown that defendant failed to deliver the same in a safe condition within a reasonable time, a presumption of negligence arises and the onus is upon the defendant to excuse itself from negligence.

(2) Evidence examined and applying the rule, held, that the same was sufficient to take the question of negligence to the jury.

(3) Where in a common law action to recover damages for the breach of a shipping contract, whereby defendant undertook to transport certain cattle within a reasonable time, the evidence reasonably tends to show that defendant breached its contract by failing so to do, the same is sufficient to take the question of negligence to the jury and the presumption of negligence is not explained or rebutted by positive evidence on *the* behalf of the defendant that the regular schedule of its stock trains would not enable it to deliver the cattle within a reasonable time.

(4) Where defendant fails to comply with Rule XXV and set forth the instruction complained of in totidem verbis, the alleged error of giving the instruction will not be considered.

(5) Where a witness qualifies as an expert in the handling of cattle his opinion that certain treatment within the issues contributed to the depreciation of the cattle, is competent evidence.

(Syllabus by the Court.)

203 Error from the County Court of Murray County.
Harry W. Fielding, Judge.

Affirmed.

W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, Attorneys for Plaintiff in Error.

J. B. Thompson, Attorney for Defendant in Error.

Opinion of the Court, by Turner, J.

This is a common law action to recover damages for the failure to deliver, within a reasonable time, certain live stock which plaintiff had delivered to defendant, a common carrier, to be transported for hire from Ft. Worth, Texas, to Kansas City, Missouri, the alleged injury growing out of the shrinkage of the cattle and a decline of

the market. After the 4th paragraph of the petition had been eliminated by demurrer, defendant answered and set up two special contracts and pleaded certain alleged exemptions therein contained to defeat the action. There was trial to a jury and judgment for plaintiff and defendant brings the case here.

As the plaintiff's right to recover depends upon his ability to show negligent delay on the part of the carrier, and, as we need not cite authorities in support of the proposition that none of the provisions of the contract limiting the common law liability of the carrier are available as a defense against its negligence, we lay the contracts out of the case.

It is first assigned that the court erred in overruling the demurrer thereto at the close of plaintiff's evidence. The contention is that the evidence was insufficient to take the question of negligence to the jury. There is no dispute as to the facts. The evidence discloses
that on May 13th, 1909, plaintiff, at Ft. Worth, Texas, noti-
204 fied defendant that he had six cars of cattle ready to ship over its road to Kansas City; that pursuant thereto, defendant furnished cars and the cattle were loaded at 5:45 that afternoon and left Ft. Worth for their destination at 7:35 p. m., after a delay of one hour and 50 minutes. They arrived at Sherman, Texas, at 3:15 a. m. the following morning, and, after a delay of one hour and 50 minutes occasioned by the defendant's dispatcher erroneously reporting the arriving time of the train, in consequence of which defendant failed to call the train crew until after the train arrived in Sherman, they left Sherman at 5:05 a. m., arriving at Denison at 5:40 a. m. and at Francis at 11:10 a. m. There were three stops between Denison and Francis aggregating a delay of one hour and 10 minutes, exclusive of which the train averaged a little over 20 miles an hour. They left Francis at 11:45 a. m. after a delay of 35 minutes, for Sapulpa. Between those points there was an unexplained stop of 38 minutes at Weleetka, 50 minutes at Okmulgee, and another at Hamilton Switch. They arrived at Sapulpa at 5:50 p. m., consuming 6 hours and 5 minutes from Francis to Sapulpa, a distance of 101 miles, making an average of about 17 miles per hour straight running time, or, deducting the stops, an average of about 22 miles an hour. After a delay of 30 minutes at Sapulpa, the train left at 6:20 p. m. for Afton, a distance of 90 miles, arriving there at 11:00 p. m., making 29 hours and 15 minutes that the cattle were on the cars. There they were unloaded at about one o'clock the morning of the 15th and placed in a pen 80 x 120 feet, with a mud hole in the middle of it, located on the main street of the town where people continually passed, causing the cattle to run back and
forth through the mud hole, and where they were so crowded
205 they could not lie down. At 7 o'clock that evening they were again loaded and permitted to stand in the cars until 9:30 p. m. before the train pulled out for Kansas City, where they arrived at 3:15 p. m., May 16th, the transit consuming 68 hours. The record further discloses that the plaintiff in writing had requested defendant to extend the twenty-eight hour period for the cattle to be on the car without unloading to thirty-six hours, and

that thirty-six hours was a reasonable time in which to transport them from the starting point to their destination. The cost of their feed at Afton was $21.00, which plaintiff paid. The cattle were sold on the market Monday, May 17th, 40 cents lower than was the market on which they would have been sold had they arrived within a reasonable time.

The undisputed facts disclosing, as they do, that 36 hours was a reasonable time in which to deliver the cattle at their destination, and 68 hours was consumed in the transit, the delay was apparently unreasonable and hence there was no error in the court holding, as it did, in effect that the evidence was sufficient to make a prima facie case for plaintiff and to take the question of negligence to the jury. In St. L. & S. F. R. Co. vs. Peery, not yet officially reported, in the syllabus, we said:

"If in a common law action to recover damages for the breach of a shipping contract, whereby defendant undertook to safely transport certain cattle, it is shown that defendant failed to deliver the same in a safe condition within a reasonable time, a presumption of negligence arises and the onus is upon the defendant to excuse itself from negligence."

And this too whether the shipping contract was in writing or not.

See also Bosley vs. Baltimore, Etc., R. Co., 46 S. E. (W. Va.)
206 615, 66 L. R. A. 871, where the court quoting approvingly from Elliott on Railroads, Vol. 4, section 1483, says:

"There is no fixed rule of law determining what will or will not constitute an unreasonable delay in all cases. The carrier is in all instances bound to use ordinary care and diligence to avoid unreasonable delay, but many elements must be taken into consideration in determining whether there was or was not unreasonable delay in the particular instance. The fact that there was unusual delay does not always show a breach of duty. * * * Where the delay was an unusual one, and is not explained, it is held to be prima facie evidence of negligence, but that in case where there is only slight delay the rule is different."

And in the same opinion:

"Is the judgment right upon the evidence? Did the defendant deliver the cattle at the place of destination safely, and within a reasonable time? An unusual delay in their delivery having been proved, it devolves upon the defendant to show that the delay was from a cause for which it was not responsible."

McMillan vs. Chicago, etc., Ry. Co. et al., 124 N. W. 1069, was an action to recover damages for negligence in the transportation of a horse, resulting in the death of the animal. The facts were that plaintiff shipped a car load of horses from the Fair at Des Moines, Iowa, to be exhibited at the Minnesota State Fair, at Hamline. They were shipped under a written contract with the C., R. I. & P. Ry. Co., for the transportation over its lines to Minneapolis and delivery of the car there to the proper connecting company; the liability of said company being limited to its own line. After the car reached Minneapolis it was without delay taken from that company by the Minnesota Transfer Company for the purpose of being switched to the

connecting track of the latter company with the other defendant, the Great Northern Railway Company, by which it was to be conveyed to the proper place for unloading at the State Fair Grounds at Hamline. The proper agent of the Great Northern was notified
207 by the agent of the Transfer Company, in due time, that certain cars, including the car containing the horses, were ready to be taken by the Great Northern Company from the transfer track to the Fair Grounds and some of the cars were so taken, but the car containing plaintiff's horses was not removed from the transfer track until the afternoon and did not reach the unloading place until 3:30 o'clock that afternoon; that by reason of the delay plaintiff's horses were chilled and the horse in controversy died. On appeal, the Supreme Court held that the verdict directed for the Rock Island Company should stand, but reversed the case as to the Great Northern Company, and in effect held that there was sufficient evidence of negligence as to the liability of that company to take the case to the jury. It further appeared that fifteen hours elapsed between the delivery of the car to the transfer track, ready to be taken by the Great Northern Company, and its final delivery to the Fair Grounds, by that company. In passing, the court said:

"Conceding the rule to be that the burden of proof is on the plaintiff to show negligent delay on the part of the carrier, and injury therefrom as the proximate result reasonably to be anticipated from the delay, we think there was enough evidence to take the case to the jury on these questions. The agents of the transfer company were also agents of the Great Northern in this sense that it was only through the agents of the transfer company that the Great Northern Company could be advised that the car was ready for transportation by the latter company to its destination; and, as already stated, the agents of the Great Northern Company were advised without unreasonable delay of that fact. It appears also that the proper employes of the Great Northern Company were personally urged by the employes of the plaintiff to facilitate the delivery of the car at the Fair Grounds, and the jury might have properly found under the evidence that there was an unreasonable delay on the part of the employes of the Great Northern Company in taking the car to the Fair Grounds as requested. Other car- ready for transportation at the same time were in fact transferred by the Great Northern Company to the Fair Grounds in a much shorter time.
If there was any special excuse, such as unusual rush of busi-
208 ness at the particular time, for not more promptly delivering the car to the Fair Grounds, it was for the Great Northern Company to show that fact. The evidence in the record tends to negative any such excuse. That the contract would not relieve the carrier from liability for negligence in failing to transport the horses to their destination in a reasonable time is settled in the case of Wisecarver vs. Chicago, R. I. & P. R. Co., 141 Ia. 121, 110 N. W. 532."

In Cleve vs. Chicago, etc. Ry. Co., 77 Neb. 166, 15 A. & E. Ann. Cas. 33, in the syllabus it is said:

"In order to recover damages for an alleged delay in the ship-

ment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose."

See also, International, etc., vs. Haynes, et al., 3 Tex. Civ. Ap. 20; Jollieffe vs. Northern Pac. R. Co. (Wash.) 100 Pac. 977; L. & N. R. R. Co. vs. Bell, 13 Ky. Law Rep. 393; 5 Am. & Eng. Enc. of Law, p. 254, and cases cited.

We are therefore of the opinion that the court did not err in overruling the demurrer to the evidence and this notwithstanding the contracts read:

"For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market."

This, for the reason that as plaintiff does not count upon a contract requiring the cattle to be "transported within any specific time," or "delivered at any particular hour," or "in season for any particular market," these contracts have nothing to do with this case.

In support of the next contention which is, that the court erred in overruling defendant's motion for peremptory instruction at the close of all the evidence, it is urged:

209 "If the court should indulge any inference on behalf of plaintiff which would justify the overruling of the demurrer to the evidence, then any such inference would be rebutted by the positive evidence on behalf of defendant that the regular schedules of its stock train would not enable it to reach the market within thirty-six hours."

While it is true that positive evidence was adduced to that effect, such evidence would not rebut anything in this case or have anything to do with it that we can see. Much less would that schedule be conclusive on the court as to what was a reasonable time in which to transport this shipment to its destination and make it the duty of the court, as a matter of law, to hold that the schedule was conclusive on that point, and instruct the plaintiff out of court. While defendant cites no authority even remotely sustaining this contention, Texas & P. Ry. Co. et al. vs. Currie, 76 S. W. (Tex.) 810, holds the other way. In that case Currie recovered judgment in two separate amounts against two railroads, as connecting carriers, for damages resulting from delay in the transportation of cattle. Both companies appealed. One of the appellants assigned that the Court erred in refusing to submit to the jury the special charge, as follows:

"The law gives the railway company the right to regulate the time to be occupied by its trains between Big Springs and Ft. Worth in the transportation of cattle, and the law further presumes that said time when fixed by it is reasonable."

In passing on this point the court said:

"* * * We are of opinion that there is no such presumption of law, Article 4484, Sayles' Ann. Civ. St. 1897, cited by appellant,

gives to railroad corporations 'the right to regulate the time and manner in which passengers and property shall be transported,' but, so far as we are advised, it has never been thought that such regulations would be enforced by the courts except where they were reasonable; and whether or not they are in any case reasonable is a qustion to be determined according to all the circumstances of such case. Furthermore, it was not an issue of reasonableness
210 of regulations, but a question of negligence'—and affirmed the judgment."

The next assignment relates to the admissibility of evidence. After W. H. Shepherd, an expert of some thirty years experience in the handling of cattle, "had detailed the size of the pen, the mudhole, the fact that there were no hay racks to place hay in, and that there were no troughs in which to water the cattle, except hog troughs, which were full of mud; that the pens were on the main street of the town and it was on Saturday and the people passed back and forth and crawled up on the pens and caused the cattle to walk back and forth in the pen and through the mud hole, and that there was no place for them to lie down and rest and they became restless, hooked and ran one another, and that they had mud on their legs and bellies and were badly drawn when they arrived at Kansas City;"—he was permitted to answer in the affirmative, over objection, the question: "Is that or not (what) contributed to their depreciation in value?" It is not contended that this was irrelevant. Such it was not, being material to the issue joined. The specific objection was that the question called for an opinion of the witness. There is no merit in the objection for the reason that the witness had previously qualified as an expert and hence was entitled to give opinion evidence.

The alleged error in giving instruction No. 2 will not be considered for the reason that the same is not attempted to be set out in totidem verbis, as required by a rule of this court. There being no merit in the remaining assignments .the judgment of the trial court is affirmed.

All the justices concur.

211 In the Supreme Court of Oklahoma.

No. 2978.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error, and respectfully represents that on the 9th day of December, 1913, a judgment was rendered by the court in the above entitled cause, affirming the judgment of the county court of Murray County against plaintiff in error; and plaintiff in error would respectfully show:

I.

Said decision overlooks an express statute, to which the attention of the court was not called, either in briefs of counsel or oral argument, to-wit: Sec. 20 of the Interstate Commerce Act, as amended by Act of June 29, 1906, (34 Stat. L. 584-593), providing that the carrier of property in interstate commerce is only liable to the holder of the receipt or bill of lading for any loss, damage or injury to such property.

II.

Said decision is in conflict with the controlling decisions
212 of this court in the cases of St. Louis & S. F. R. Co. vs. Bilby, 35 Okla. 589, 130 Pac. 1080; M. K. & T. Ry. Co. vs. Walston, — Okla. —, 135 Pac. 42; and St. Louis & S. F. R. Co. vs. Zickefoose, 135 Pac. 406.

III.

Said decision is in conflict with the controlling decisions of the Supreme Court of the United States in the following cases, to-wit:

Adams Express Co. vs. Croninger, 226 U. S. 491, 57 L. Ed. —.

M. K. & T. Ry. Co. vs. Harriman, 227 U. S. 657, 57 L. Ed. —.

K. C. S. Ry. Co. vs. Carl, 227 U. S. 639, 57 L. Ed. —.

Wells Fargo & Co. vs. Neiman-Marcus Co., 227 U. S. 459, 57 L. Ed. —.

New York Cent. & Hudson River R. Co. vs. Board of Chosen Freeholders, 227 U. S. 248;

St. Louis, I. M. & S. Ry. Co. vs. Edwards, 227 U. S. 265, 57 L. Ed. —.

Southern Ry. Co. vs. Reid, 222 U. S. 424, 56 L. Ed. —.

York Mfg. Co. vs. Illinois Cent. R. Co., 3 Wall. 107, 18 L. Ed. 170.

Cau vs. T. & P. R. Co., 194 U. S. 427, 48 L. Ed. 1053;

Arthur vs. T. & P. R. Co., 204 U. S. 305, 51 L. Ed. 590.

Mondou vs. New York, N. H. & H. R. Co., 223 U. S. 1, 56 L. Ed. 327.

IV.

Said decision overlooks a question decisive of the cause, and duly presented by counsel, to-wit: That the delay occurring in the transportation of plaintiff's livestock was due to the necessity of unloading said livestock for feed, rest and water, as required by Act of Congress of June 29, 1906 (34 Stat. L. 607).

213 & 214 V.

Said decision overlooks a question decisive of the case, and duly presented by counsel, viz., That said livestock, having been loaded on the cars two hours before they were received by the defendant, could not, under the provisions of the Act of Congress above re-

ferred to, be carried for thirty-six hours thereafter without unloading for feed, rest and water.

VI.

Said decision is in conflict with Sec. 8, Art. 1 of the Constitution of the United States, as being an attempt to regulate interstate commerce.

(Omitting argument.)

For the reasons above stated, we respectfully submit that a rehearing should be granted in this cause, and that upon a reconsideration thereof, the judgment of the County Court of Murray County should be reversed.

Respectfully submitted,

W. F. EVANS,
R. A. KLEINSCHMIDT,
E. H. FOSTER,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 2978. In the Supreme Court of Oklahoma. St. Louis and San Francisco Railroad Company, Plaintiff in Error, vs. H. B. Shepherd, Defendant in Error. Petition for rehearing. Filed Dec. 23, 1913. W. H. L. Campbell, Clerk.

* * * * * * *

215 Thereafter to-wit, on the 7th day of April, 1914, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, March Term, 1914, April 7, 1914.

No. 2978.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

Now on this day, it is ordered by the court that the petition for rehearing filed herein, be, and the same is hereby denied.

216 In the Supreme Court of the State of Oklahoma.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages, numbered from 1 to 215, both inclusive, are a full, true and complete transcript of the record and all proceedings in said Supreme Court in cause numbered 2978, St. Louis and San Francisco Railroad Company, Plaintiff in error, vs. H. B. Shepherd, Defendant in error, as the same remains on file and of record in my office.

In Witness Whereof, I hereunto set my hand and affix the seal of said Supreme Court of Oklahoma, in Oklahoma City, Oklahoma, this 20th day of May, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL.
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

217 In the Supreme Court of the United States.

No. 1085.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

Statement of Errors and Part of the Record to be Printed.

Comes now St. Louis and San Francisco Railroad Company, plaintiff in error herein, and for its statement of errors upon which it will rely says that it intends to rely upon the several errors set forth and assigned in its assignments of error, filed in the Supreme Court of the State of Oklahoma, and in this Court, and numbered from 1 to 16, inclusive; which assignments of error it prays to be taken and considered as a part of this statement as if the same were specifically here set forth.

And said plaintiff in error hereby designates the parts of the record to be printed, and which it thinks necessary for the consideration of this court, and also designates the parts of said record to be omitted:

W. F. EVANS,
R. A. KLEINSCHMIDT,
E. H. FOSTER,
Attorneys for Plaintiff in Error.

H. B. SHEPHERD.

Service of the above and foregoing statement of errors, and designation of parts of record to be printed, is acknowledged to have been made on me, attorney of record for defendant in error, this 29th day of May, 1914.

J. B. THOMPSON,
Attorney for Defendant in Error.
By B. W. PATTERSON.

221 [Endorsed:] 1085/24236. No. —. In the Supreme Court of the United States. St. Louis and San Francisco Railroad Company, Plaintiff in Error, vs. H. B. Shepherd, Defendant in Error. Statement of errors and part of the record to be printed.

222 [Endorsed:] File No. 24,236. Supreme Court U. S. October term, 1913. Term No. 1085. St. Louis & San Francisco Railroad Company, Pl'ff in Error, vs. H. B. Shepherd. Statement of errors relied on and designation by plaintiff in error of parts of record to be printed and omited, with proof of service of same. Filed June 2, 1914.

223 In the Supreme Court of the United States.

No. —.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

Præcipe of Defendant in Error for Printing Additional Portions of Record.

Comes now H. B. Shepherd, defendant in error, and requests the Clerk of this Court to include the following portions of the record to be printed in this case, in addition to those requested by Plaintiff in error, and which were designated by it as parts to be omitted, to wit:—

Opening statements of counsel, shown on pages 76 to 79 inclusive, of the case-made filed herein.

H. B. SHEPHERD,
Defendant in Error,
By J. B. THOMPSON,
His Attorney.

B. W. P.—B.
6-5-'14.

224 [Endorsed:] No. —. In the Supreme Court of the United States. St. Louis and San Francisco Railroad Company, plaintiff in error, vs. H. B. Shepherd, defendant in error. Præcipe

of Defendant in Error for Additional Portions of the Record. J. B. Thompson, Pauls Valley, Oklahoma, attorney for Defendant in Error.

225 [Endorsed:] File No. 24,236. Supreme Court U. S. October term, 1913. Term No. 1085. St. Louis and San Francisco Railroad Company, Pl'ff in Error, vs. H. B. Shepherd. Designation by defendant in error of additional parts of record to be printed. Filed June 10, 1914.

226 In the Supreme Court of the United States, October Term, 1913.

No. 1085.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
H. B. SHEPHERD, Defendant in Error.

Amendment of Statement of Errors and Designation of Parts of Record to be Printed.

Comes now the plaintiff in error and hereby amends its statement of errors and designation of parts of record to be printed, as follows, to-wit:

By designating, under the title "Part to be printed," in the left-hand column, the following:

Caption of casemade, page 26.

Summons and return, pages 31-32.

And by striking from the right-hand column, under the

227 title "Part to be omitted," the following:

Summons and return, pages 31-32.

W. F. EVANS,
R. A. KLEINSCHMIDT,
E. H. FOSTER,
Attorneys for Plaintiff in Error.

I hereby acknowledge service of the within and foregoing amendment to statement of errors and designation of parts of record to be printed, this 8th day of June, 1914.

J. B. THOMPSON,
Attorney for Defendant in Error.
By B. W. PATTERSON.

228 [Endorsed:] No. 1085, October Term, 1913. 24236. In the Supreme Court of the United States. St. L. & S. F. R. Co., Plaintiff in Error, vs. H. B. Shepherd, Def't in Error. Amendment of Statement of Errors and Designation of Parts of Record to be Printed.

229 [Endorsed:] File No. 24236. Supreme Court U. S. October term, 1913. Term No. 1085. St. Louis & San Francisco Railroad Company, Pl'ff in Error, vs. H. B. Shepherd. Amendment of statement of errors to be relied upon, and designation by plaintiff in error of parts of record to be printed and proof of service of same. Filed June 22, 1914.

Endorsed on cover: File No. 24,236. Oklahoma Supreme Court. Term No. 160. St. Louis & San Francisco Railroad Company, plaintiff in error, vs. H. B. Shepherd. Filed May 25th, 1914. File No. 24,236.

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In the Supreme Court of the United States

October Term, 1915

St. Louis and San Francisco Railroad Company,
Plaintiff in Error,

vs.

H. B. Shepherd,
Defendant in Error.

No. 160

BRIEF OF PLAINTIFF IN ERROR.

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Oklahoma Law Brief Company, 120 West Third St., Oklahoma City.

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In the Supreme Court of the United States

October Term, 1915

St. Louis and San Francisco Railroad Company,
Plaintiff in Error,

vs.

H. B. Shepherd,
Defendant in Error.

No. 160

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was brought by defendant in error in the County Court of Murray County, Oklahoma, to recover damages for alleged delay in the transportation of a shipment of six cars of live stock shipped by him from Ft. Worth, Texas, to Kansas City, Missouri. This live stock was loaded on the cars at the Stock Yards in Ft. Worth at 5:45

p. m. May 13, 1909 (Rec. 33). At 7 p. m. (Rec. 69) the same date they were delivered to the Ft. Worth and Rio Grande Railway Company, the initial carrier, and a subsidiary line of the plaintiff in error; and that carrier thereupon entered into a written contract with the defendant in error, the consideration for said contract being a reduced rate of freight. The shipment was transported without delay, except the usual delays at stations and terminals, to Afton, Oklahoma, arriving at the latter point at 11 p. m. May 14th (Rec. 39), having been confined on the cars 29 hours and 15 minutes. Afton being 191 miles from the point of destination, and there not being sufficient time to complete the transportation within 36 hours, the live stock were unloaded for feed, rest, and water, in compliance with the Act of Congress of June 29, 1906 (34 Stat. at L. 607). They were reloaded at 7 p. m. the following day, and arrived at destination at 3:15 p. m. Sunday, May 16th, and were sold on Monday's market.

The sole contention of defendant in error is, and was on the trial in the state court, that 36 hours was a reasonable time in which to transport said live stock from Ft. Worth to Kansas City, and that in the due course of transportation they

should have reached destination in time for sale on the morning market of May 15th; but that, failing to reach said market defendant in error sustained damage, by way of shrinkage and decline of market. He recovered a judgment in the sum of $700, which was affirmed by the Supreme Court of Oklahoma (Rec. 87 to 92); and that judgment is brought to this court for review by petition in error.

ABSTRACT AND REVIEW OF EVIDENCE

The execution of the written contract for the transportation of the live stock is admitted. That contract contains the following stipulations, which are insisted upon here:

"4th. For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market; that neither the company nor any connecting line shall be responsible for any delay caused by storm, failure of machinery or cars, or from obstructions of track from any cause, or any injury caused by fire from any cause whatever" (Rec. 24).

"11th. That at a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims" (Rec 26).

"14th. That no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall accrue, and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding" (Rec. 26, 27).

Each and all of these stipulations were pleaded by plaintiff in error as a defense to the action.

The live stock, the subject of this contract, were loaded at the stock pens, the shipment being delivered, in the first instance, to a terminal or belt line railroad, in which neither plaintiff in error nor the initial carrier, the Ft. Worth and Rio Grande Railway Company, had any interest (Rec. 42). Having been delivered to the carrier at 7 o'clock p. m. the live stock moved out of Ft. Worth, 7:35 p. m., being carried on a regular freight train—that is, a train not devoted exclusively to the transportation of live stock. The train arrived at Sherman, Texas, the first division point, at 3:15 the next morning; left Sherman at 5:05 a. m. the same day; arrived at Francis, Oklahoma, the next divi-

sion point, at 11:15 a. m.; left Francis at 11:45 a. m.; arrived at Sapulpa, Oklahoma, at 5:45 p. m.; left Sapulpa at 6:30 p. m.; arrived at Afton at 11 p. m., where they were unloaded for feed, water, and rest (Rec. 39). A complete record of the delays on this part of the journey is set out on pp. 56-7 of the printed transcript; and, with the exception of the delay at Afton on account of feed, rest, and water, these delays consisted of the ordinary station and terminal stops; and there is nothing in the testimony tending to show that such delays were unusual or unnecessary.

No claim is made of any rough handling or physical injury to the live stock enroute, the claim for damages being based entirely upon the alleged failure on the part of the carrier to transport and deliver the cattle in time for sale on the market of May 15th.

No proof was offered that any notice of the claim for damages on account of said alleged delay was given, in accordance with the 11th stipulation of the contract, above set out, and no effort to show that the condition precedent had been compiled with. The cause of action, if any, arose not later than May 16, 1909, the date upon which the live stock were delivered at destination. Suit was

not instituted until December 18, 1909 (Rec. 12-13), more than six months after the alleged cause of action accrued, and therefore the 14th provision of the contract was not complied with.

POINTS DECIDED.

The Supreme Court of Oklahoma, by its decision in this case, deprived plaintiff in error of all benefits under the written contract of transportation, entered into with the shipper; and also deprived plaintiff in error of all the benefits of the Act of Congress, commonly known as the Interstate Commerce Act, and the several amendments thereto, especially the amendment of June 29, 1906, whereby, among other things, it is provided as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass."

It is held that the cause of action is not one arising under the Interstate Commerce Act and its amendments, but is one existing at common-law,

and therefore not subject to control by a contract between the parties.

In that connection, the State Supreme Court says (Rec. 87):

> "This is a common law action to recover damages for the failure to deliver, within a reasonable time, certain live stock which plaintiff had delivered to defendant, a common carrier, to be transported for hire from Ft. Worth, Texas, to Kansas City, Missouri, the alleged injury growing out of the shrinkage of the cattle and a decline of the market. After the 4th paragraph of the petition had been eliminated by demurrer, defendant answered and set up two special contracts and pleaded certain alleged exemptions therein contained to defeat the action. There was trial to a jury and judgment for plaintiff and defendant brings the case here.
>
> "As the plaintiff's right to recover depends upon his ability to show negligent delay on the part of the carrier, and, as we need not cite authorities in support of the proposition that none of the provisions of the contract limiting the common law liability of the carrier are available as a defense against its negligence, we lay the contracts out of the case."

With reference to the 4th stipulation of the contract (Rec. 24), providing that said live stock was not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market, the Supreme Court of Oklahoma in its opinion says (Rec. 91):

"We are therefore of the opinion that the court did not err in overruling the demurrer to the evidence and this notwithstanding the contracts read:

"'For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market.'

"This, for the reason that as plaintiff does not count upon a contract requiring the cattle to be 'transported within any specific time,' or 'delivered at any particular hour,' or 'in season for any particular market,' these contracts have nothing to do with this case."

By eliminating the written contract, the Court also deprived plaintiff in error of the benefit of stipulations numbered 11 and 14, above set out, and affirmed the judgment of the lower court in favor of defendant in error, notwithstanding no written notice was given as provided by the contract, and suit was not instituted for the recovery of the damages alleged to have been sustained within six months next after the accrual of the alleged cause of action.

The Supreme Court of Oklahoma, by its decision, also deprived plaintiff in error of the benefits of the Act of Congress of June 29, 1906 (34 Stat. at L., 607), prohibiting the confinement on

cars, for a period in excess of 36 consecutive hours, live stock being transported by a common carrier from a point in one state to a point in another state, and held that plaintiff in error was chargeable with negligent delay, notwithstanding it appears from the undisputed evidence that such delay was due to the unloading of said live stock for feed, water, and rest, in compliance with the provisions of said Act of Congress; in so holding, the State Supreme Court, in the course of its opinion, said:

> "The undisputed facts disclosing, as they do, that 36 hours was a reasonable time in which to deliver the cattle at their destination, and 68 hours was consumed in the transit, the delay was apparently unreasonable and hence there was no error in the court holding, as it did, in effect, that the evidence was sufficient to make a *prima facie* case for plaintiff and to take the question of negligence to the jury."

ASSIGNMENTS OF ERROR

(Rec. 5, 6, 7, 8.)

First.

The Supreme Court of Oklahoma erred in affirming the judgment of the County Court of Murray County, State of Oklahoma.

Second.

The Supreme Court of Oklahoma erred in not reversing said judgment of the County Court of Murray County, State of Oklahoma.

Third.

The Supreme Court of Oklahoma erred in holding that defendant in error might pursue a common law remedy to recover damages against plaintiff in error for any loss, damage or injury caused to the property of defendant in error, which was being conveyed from a point in one state to a point in another state, and in holding that said common law remedy was not superseded by the Act of Congress approved February 4, 1887, and the Amendments thereto, commonly called the Interstate Commerce Act, or An Act to Regulate Commerce.

Fourth.

The Supreme Court of Oklahoma erred in

holding that defendant in error might sue for and recover damages for any loss, damage or injury caused to property being conveyed by a common carrier from a point in one state to a point in another state, otherwise than as holder of the receipt or bill of lading issued by said common carrier, under and in accordance with the provisions of said Act of Congress approved February 4, 1887, and the Amendments thereto, commonly called the Interstate Commerce Act, or An Act to Regulate Commerce.

Fifth.

The Supreme Court of Oklahoma erred in refusing to hold that a common carrier receiving or accepting property to be conveyed from a point in one state to a point in another might limit its liability for any loss, damage, or injury to said property occurring in the course of transportation by a contract in writing, based upon a valuable consideration and made for the purpose of adjusting the freight rates and for the purpose of determining which of two alternative rates provided by the published tariffs of said carrier on file with the Interstate Commerce Commission should apply to said shipment.

Sixth.

The Supreme Court of Oklahoma erred in holding that the written contract under which the property of defendant in error was conveyed from Ft. Worth, Texas, to Kansas City, Missouri, was not binding upon defendant in error.

Seventh.

The Supreme Court of Oklahoma erred in refusing to hold that the 4th stipulation of the written contract under which the property of defendant in error was conveyed from a point in one state to a point in another state was valid and binding; said stipulation of said contract being in words and figures as follows:

"For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market."

Eighth.

The Supreme Court of Oklahoma erred in refusing to hold that the 11th stipulation of the written contract under which the property of defendant in error was conveyed from a point in one state to a point in another state was valid and binding; said stipulation of said contract being in words and figures as follows:

"That as a condition precedent to a recovery for any damage for delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some General Officer, or the nearest station agent of the first party, or to the agent at destination, or some General Officer of the delivering line, before such Stock is removed from the point of shipment or from the point of destination, and before such Stock is mingled with other stock, such written notification to be served within one day after the delivery of such Stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.

Ninth.

The Supreme Court of Oklahoma erred in refusing to hold that the 14th stipulation of the written contract under which the property of defendant in error was conveyed from a point in one state to a point in another state was valid and binding; said stipulation of said contract being in words and figures as follows:

"That no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall accrue and should any suit or action be commenced against the first party after

the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

Thirteenth.

The Supreme Court of Oklahoma erred in refusing to hold that the authority and jurisdiction conferred upon and vested in the Interstate Commerce Commission by the Act of Congress approved February 4, 1887, as amended by the Act of March 2, 1889, and Act of February 10, 1891, to inquire into the management of the business of all common carriers engaged in interstate commerce, to enforce the provisions of said Act of Congress, and to prescribe and regulate the service afforded by such common carrier to the public, is exclusive of all state courts or other tribunals.

Fourteenth.

The Supreme Court of Oklahoma erred in holding that plaintiff in error was chargeable with negligent delay of a shipment of live stock being conveyed from a point in one state to a point in another state by reason of the unloading of said live stock for feed, rest, and water, in compliance with the provisions of the Act of Congress approved June 29, 1906 (34 Stat. at L., 607).

Fifteenth.

The Supreme Court of Oklahoma erred in holding that plaintiff in error was liable in damages for refusing to confine in cars for a period in excess of thirty-six consecutive hours live stock being conveyed by it as a common carrier from a point in one state to a point in another state.

Sixteenth.

The Supreme Court of Oklahoma erred in holding that delay to a shipment of live stock being conveyed by plaintiff in error as a common carrier from a point in one state to a point in another state, caused by the unloading of said live stock for feed, rest, and water, in compliance with the Act of Congress approved June 29, 1906, raised a presumption of negligence against plaintiff in error, and rendered it *prima facie* liable in damages to the owner of said live stock.

ARGUMENT

The initial error committed by the Supreme Court of Oklahoma was the denial by it of the exclusiveness of the remedies afforded by the Interstate Commerce Act, and particularly of the amendment of June 29, 1906, known as the Carmack Amendment, for any loss, damage or injury to property being transported by a common carrier in interstate commerce. The theory of the court's decision is that the shipper may waive the remedies afforded by these several Acts of Congress, and if the bill of lading or contract issued in accordance therewith imposes conditions which are onerous to him, or with which he does not choose to comply, he may disregard such contract and resort to his supposed common law remedies to recover for any such loss, damage or injury which may have been caused by the carrier in the course of interstate transportation.

As evidencing such intention, the court begins its opinion with the following sentence:

> "This is a common law action to recover damages for the failure to deliver within a reasonable time certain live stock which plaintiff had delivered to defendant as a common carrier to be transported for hire from Ft. Worth, Texas, to Kansas City, Missouri."

And, having thus determined the nature of the action, the court concludes:

> "We (therefore) lay the contracts out of the case."

It is thus made plain that plaintiff in error was subjected to a liability for alleged damage or injury to freight being transported in interstate commerce without regard to the provisions of the contract entered into in accordance with the terms of the Interstate Commerce Act; and if that contract contained provisions or stipulations which afforded a defense to the action, the court by "laying the contracts out of the case," thereby deprived plaintiff in error of such defense. That the rights and remedies afforded a shipper in interstate commerce by the provisions of the Interstate Commerce Act, and its amendments, are exclusive of all others, except such as are given by existing Federal law, is so well settled by a long line of decisions of this court as to be no longer open to controversy.

T. & P. R. Co. v. *Abilene Cotton Oil Company*, 204 U. S. 426, 51 L. Ed. 553.

Adams Express Co. v. *Croninger*, 226 U. S. 491, 57 L. Ed. 314.

K. C. Southern Ry. Co. v. *Carl*, 227 U. S. 639, 57 L. Ed. 683.

M., K. & T. v. *Harriman*, 227 U. S. 657, 57 L. Ed. 690.

Wells Fargo & Co. v. *Neiman-Marcus Co.*, 227 U. S. 459, 57 L. Ed. 600.
St. L., I. M. & S. Ry. Co. v. *Edward*, 227 U. S. 265, 57 L. Ed. 506.
Barrett v. *City of New York*, 232 U. S. 14, 58 L. Ed. 483.
B. & M. R. Co. v. *Hooker*, 233 U. S. 97, 57 L. Ed. 868.
Geo. N. Pierce Co. v. *W. F. & Co.*, 236 U. S. 278, 59 L. Ed. 576.
C. & C. W. Ry. Co. v. *Varnville Fur Co.*, 237 U. S. 597, 59 L. Ed. 1137.

The point in issue was expressly decided by this court in the leading case of *Adams Express Company* v. *Croninger*, 226 U. S. 491, *supra*. In that case it appears to have been conceded that the general language of the Amendment of June 29, 1906, would have been subject to an interpretation that would exclude all rights and remedies for the enforcement of liability for loss, damage or injury to goods in the course of interstate transportation, but for the proviso to the effect that nothing in said section should deprive any holder of the receipt or bill of lading of any remedy or right of action which he had under existing law. To state the contention there made in the language of this court:

> "But it has been argued that the non-exclusive character of this regulation is mani-

fested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier, conferred by existing state law."

Such contention is thus disposed of by the court:

"This view is untenable. It would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulation which it was the purpose of congress to put an end to.

"What this court said of the 22nd section of this act of 1887 in the case of *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 425, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Sup. Ct. Rep. 1075, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in the 20th section, that it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this Act. Again it was said of the same clause in the same case that it could not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

The direct and immediate effect of the decision of the State Supreme Court was to place upon the Amendment of June 29, 1906, an interpretation wholly different from that which it had received at the hands of this Court, and to deny to its provisions that exclusive character which it is now universally conceded. Its effect upon the substantial rights of plaintiff in error was to take from it the right to contract for the transportation of property in interstate commerce or to avail itself of any valid provisions of the contract entered into under and in accordance with the provisions of the Amendment. It follows that the decision is a deprivation of a right arising under the Constitution and laws of the United States.

As was said by this Court in the case of *M., K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657, *supra:*

> "The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment of the Hepburn act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation."

In the more recent case of *A., T. & S. F.* v. *Robinson*, 233 U. S. 173, 98 L. Ed. 901, the state court having denied to the carrier the right to assert as a defense to an action for damages the provisions of the contract of transportation, this Court in reviewing the judgment said:

> "It is thus seen that the defendant specially set up a defense under the interstate commerce act a Federal statute, which, if denied to him, was an adverse ruling of Federal right which would warrant the bringing of this case to this court from the highest court of a state under former section 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575), now section 237 of the Judicial Code (36 Stat. at L. 1156 Chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227). It is apparent from the foregoing statement that the Federal ques-

tion now presented involves the ruling of the state court denying to the carrier the benefit of the interstate commerce act, a compliance with which was set up in the amended answer, and supported by testimony tending to show the truth of the allegations thereof."

It follows that the decision herein is clearly erroneous, and that the plaintiff in error thereby stands deprived of a substantial Federal right, provided only that the several provisions of the contract, of which it sought to avail itself, are valid, and constitute a defense to the action. Therefore, it remains only to consider the validity of the stipulations relied upon.

The stipulation that the live stock was not to be transported within any specific time, etc., is valid.

One of the conditions and stipulations of the live stock contract, upon which plaintiff in error relied in the state court, is the 4th; so much of said stipulation as is material for consideration here being as follows:

"For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market."

The defense based upon that stipulation was denied, not upon the ground that the stipulation

itself was invalid or contravened any consideration of public policy, but merely for the reason that the contract of which it was a part was not to be considered as material to the case.

At the conclusion of the evidence offered by defendant in error, a demurrer thereto was interposed upon the ground that, under the plain terms of the contract, an action was not maintainable for mere failure to transport and deliver the live stock in season for the market of May 15th.

In affirming the action of the trial court in overruling this demurrer, the Supreme Court of Oklahoma say:

> "We are therefore of the opinion that the Court did not err in overruling the demurrer to the evidence and this notwithstanding the contracts read:
>
> "'For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time, nor delivered at any particular hour; nor in season for any particular market.'
>
> "This, for the reason that as plaintiff does not count upon a contract requiring the cattle to be 'transported within any specific time,' or 'delivered at any particular hour,' or 'in season for any particular market,' *these contracts have nothing to do with the case.*" (Italics ours).

This is strange language, in view of the specific allegations of the petition, which based recovery upon the sole ground of the alleged failure to transport the live stock "in season for a particular market," namely, the market of May 15th, and can only be interpreted in the light of the context of the opinion, holding that the purpose of the suit is the enforcement of the shipper's common law right, and that the contracts issued in accordance with the provisions of the Interstate Commerce Act are not to be considered. But, as above pointed out, the remedy afforded by the Interstate Commerce Act and its Amendments is exclusive, and the contract alone must be looked to in determining the shipper's right to recover damages for any loss or injury occurring in the course of interstate transportation.

The validity of the provision of the contract now under consideration not having been questioned in the court below, may not now be open to discussion; but we take occasion to call the Court's attention to numerous decisions wherein the validity of similar contract provisions have been upheld:

Smith v. *C., R. I. & P. Ry. Co.*, 87 S. W. 9.

Fullbright v. *Wabash R. R. Co.*, 94 S. W. 922.

Gilbert v. *C., R. I. & P. Ry. Co.*, 112 S. W. 1002.

St. L., I. M. & S. Ry. Co. v. *Jones*, 125 S. W. 1025.

C., C., C. & St. L. Ry. Co. v. *Heath*, 53 N. E. 198.

In fact, it is said that no duty of a common carrier to transport and deliver live stock in season for a particular market exists at common-law, in the absence of an express undertaking to that effect.

5 Amer. and Eng. Ency. of Law 451.

It is manifest that no action could be maintained by a shipper upon an *implied* contract with a carrier to make delivery in season for a particular market, unless an *express* contract to that effect would be upheld. And in this connection, we submit that if plaintiff in error had undertaken by express contract to deliver this live stock in season for the market of May 15th, that contract would have been void as violative of the provisions of the Amendment to the Interstate Commerce Act of February 19, 1903, known as the Elkins Amendment.

This was expressly held in the case of *C. & A.*

Ry. Co. v. *Kirby*, 225 U. S. 155, 56 L. Ed. 1033. In that case it appeared that plaintiff delivered to the defendant railroad company, at Springfield, Illinois, a carload of high grade horses for shipment to New York; and it appeared that defendant, knowing that these horses were intended for exhibition purposes, agreed to deliver them at Joliet, Illinois, in time for connection with the fast stock train destined for New York. The suit was brought for a violation of the alleged agreement, and plaintiff recovered damages on account of the failure to make the connection. This judgment was appealed by the railroad company to the Court of Appeals, and thence to the Supreme Court of the state, in both of which the judgment was affirmed; and the case was then brought to this Court by petition in error, whereupon, in reversing the judgment of the Supreme Court of Illinois, it was, among other things, said:

> "That the railroad company had established and published through joint rates and charges upon carload shipments of live stock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transporation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which

his car was to be carried so as to be attached to the fast stock special and carried by it to New York. * * *

"The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

"For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish that rate open to all. This was not done.

"The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such contract relief will be de-

nied, because its allowance without such publication is a violation of the act. It is also illegal, because it is an undue advantage, in that it is not one open to all others in the same situation."

In the instant case it appears by the undisputed evidence that the live stock in question were delivered for transportation upon one of plaintiff in error's regular freight trains. In the regular course of transportation upon that train it was impracticable, if not impossible, for the transportation to have been completed and the live stock delivered in season for the market of May 15th.

It is not contended that plaintiff in error had in effect a rate of freight applicable to the expedited service demanded by such a course of transportation. On the contrary, defendant in error elected to ship his live stock upon a train not adapted to the furnishing of preferred or expedited service, and at a rate of freight provided by the tariffs of the carrier for the regular, ordinary freight service, subject to such conditions and exigencies as might arise in the course of transportation. Having accepted that service and paid the rate commensurate therewith, he cannot now hold the carrier to a liability which was expressly ex-

cepted by the contract, or claim the benefit of a class of service to which he was not entitled.

Therefore, if the supremacy of the Interstate Commerce Act be upheld, and the right of plaintiff in error to contract for the transportation of property in interstate commerce, in accordance with that Act, is recognized, it inevitably follows that the stipulation now under consideration is valid, and plaintiff in error cannot be subjected to liability for the mere failure to transport the live stock in time for sale upon the market for which it is claimed they were intended.

The provision of the contract requiring notice is valid.

Another provision of the contract of which plaintiff in error sought to avail itself is the 11th, which is as follows (Rec. 26):

"That as a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the point of destination, and before such stock is mingled with other stock, such written notification to be served within one day after

the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

While we have encountered no decision of this court wherein the validity of such a provision of any interstate contract has been called in question, it may be asserted without fear of successful contradiction that such provisions are invariably upheld except in instances where they are prohibited by statute. Similar provisions have met the unqualified approval of the Supreme Court of Oklahoma, except in the instant case. And in a long line of decisions rendered, both before and after the decision in the Croninger case, it is held that a requirement that notice shall be given before the live stock are mingled with other stock, so as to enable the carrier to fully investigate the claim, is valid, and contravenes no principle of public policy.

S. L. & S. F. R. Co. v. *Phillips*, 17 Okl. 264, 87 Pac. 470.

St. L. & S. F. R. Co. v. *Cake*, 25 Okl. 227, 105 Pac. 322.

M., K. & T. v. *Hancock & Dunbar*, 26 Okl. 265, 109 Pac. 233.

Midland Valley Ry. Co. v. *Ezell*, 29 Okl. 40, 116 Pac. 163.

C., R. I. & P. Ry. Co. v. *Conway*, 34 Okl. 356, 125 Pac. 1110.

St. L. & S. F. R. Co. v. *Bilby*, 35 Okl. 589, 130 Pac. 1080.
St. L. & S. F. R. Co. v. *Zickefoose*, 39 Okl. 302, 135 Pac. 406.
C., R. I. & P. Ry. Co. v. *Bruce* (Okl.), 150 Pac. 880.
St. L. & S. F. R. Co. v. *Pickens* (Okl.), 151 Pac. 1055.
St. L. & S. R. R. Co. v. *Waggoner* (Okl.), 152 Pac. 448.

In the more recent decisions the contract provision requiring notice as a condition precedent to the maintenance of an action is upheld, notwithstanding a state constitutional provision prohibiting such contract; the court's decisions being based upon the ground that the contracts involved relate to the transportation of freight in interstate commerce, and are therefore not affected by any state statutory or constitutional provision.

In the instant case no attempt was made on the part of defendant in error to show a compliance with the condition of the contract now under consideration. Under the decisions above referred to the burden of proof is upon the plaintiff in an action of this character to establish compliance with a condition precedent of a written contract; and, therefore, the failure to prove compliance would necessarily have precluded recovery but for

the action of the state Supreme Court in ignoring the contract.

The provision of the contact limiting the time in which to bring suit is valid.

The plaintiff in error also relied upon the 14th stipulation of the written contract, which is as follows:

"That no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall accrue, and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding" (Rec. 27).

The cause of action, if any, accrued May 16, 1909, and this suit was not instituted until December 18, 1909 (Rec. 12). Plaintiff in error was therefore entitled to the benefit of the limitation imposed by the terms of the contract. Such a limitation in a contract of this character has been upheld by this court in *M., K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657, 57 L. Ed. 690. Also by the Supreme Court of Oklahoma in the following cases:

M., K. & T. Ry. Co. v. *Hancock & Dunbar*, 26 Okl. 265, 109 Pac. 223.

St. L. & S. F. R. Co. v. *Pickens* (Okl.), 151 Pac. 1055.

The contract stipulations do not exempt the carrier from liability for negligence.

The position of the State Supreme Court appears to be that, inasmuch as the petition in this case characterizes the failure to make delivery in time for the market of May 15th as "negligent delay," plaintiff in error is not entitled to the benefit of any of the provisions of the live stock contract. This view is manifestly untenable. The provisions in question do not purport to exempt plaintiff in error from the consequences of its negligence but merely prescribe the manner of ascertaining and determining the amount of loss or damage, and of enforcing the liability, if any. That such stipulations are not invalid as tending to relieve the carrier of liability for negligence has been too often decided to be longer open to question.

In *Hart* v. *Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, a similar contentions was thus disposed of by this court:

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from

> the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if the shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The doctrine of the case above cited has been repeatedly reaffirmed and adhered to by this court in cases involving the right of the carrier to limit, by special contract, its liability for loss, damage or injury to goods being carried in interstate commerce. Thus, in *Adams Ex. Co. v. Croninger*, 226 U. S. 491, *supra*, it was said:

> "The rule of the common law did not limit (the carrier's) liability to loss and damage due to his own negligence or that of his servants. That rule went beyond this, and he was liable for any loss or damage which re-

> sulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported."

It may be urged that these cases deal with limitations upon the value of the property transported, as affording a basis for the adjustment of freight charges. But we submit that there is no well founded distinction between such a stipulalation and one which relieves the carrier of the duty of making delivery "at any specific time, or in season for any particular market," as contained in the contract now under consideration. Cases are to be encountered wherein the shipper has been permitted to recover, as an element of damages for delay in transportation, for a loss of market, or the difference between the market value on the day of actual sale, and the value on the day the property would, or might have been, sold, if transported with due diligence. But this is essentially in the nature of special damages, and

liability is dependent upon the intention of the parties, and the terms of the contract, whether express or implied. If property is delivered to the carrier with instructions to transport it in time for the market of a particular day, and the intervening time is insufficient to admit of delivery within that time, taking into consideration the various conditions and exigencies with which the carrier may have to contend, he would have a perfect right to decline the shipment or to refuse to undertake to make delivery within the time required by the shipper. But, if he undertakes it, or agrees to make delivery within the specified time, he is liable for a failure to comply with such agreement, whether such failure is due to the negligence of himself or his servants or to some wholly innocent cause, short of an act of God or the public enemy; and, as a part of the damages, he may be required to compensate the shipper for any loss sustained by reason of a decline of market.

But it cannot be seriously denied that the carrier, in accepting for transportation goods intended for sale at the place of destination, may, by a fair, open, just and reasonable contract, relieve himself of the payment of special damages

incident to a loss of market. And that is exactly what was done in the instant case. So far from the contract being one whereby the carrier undertook or agreed to transport the property "within any specific time" or to deliver it "in season for any particular market," it expressly declined to render that class of service; and the shipper, in consideration of a reduced rate of freight, expressly agreed that the live stock covered by the contract was *not* to be transported or delivered in season for any particular market. This constituted a waiver of the damages claimed in the petition, *i. e.*, special damages resulting from a loss of market, etc., and it is manifestly unconscionable for him now to claim damages of which the carrier was relieved by the express terms of the contract. As said by this court in *K. C. S. R. Co.* v. *Carl*, 227 U. S. 639, *supra*: "Such a result would neither be just nor conducive to sound morals or wise policies."

That provision of the contract requiring that notice of any claim for damages shall be given before the live stock are mingled with other stock "to the end that such claim shall be fully and fairly investigated," is certainly not open to the objection that it seeks to exempt the carrier from

liability for negligence. The manifest purpose of that stipulation is to protect the carrier against fraudulent or unreasonable claims. It goes only to the question of adjustment, and has no tendency to relieve the carrier from liability, whether that liability be founded upon negligence or otherwise. Such has been the uniform holding of the Supreme Court of Oklahoma, except in the instant case.

In *St. L. and S. F. R. Co.* v. *Phillips*, 17 Okl. 264, 87 Pac. 479, it was said:

> "The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence, or from the negligence or misfeasance of any of its servants. The company concedes that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud or imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damages and its cause. After the property has been taken from their possession and mingled with other property of like kind the difficulty of inquiring into the circumstances and character of the injury would be very greatly increased. That such a provision does not contravene public policy, and that it is just and reasonable, has been expressly adjudicated by this court."

As approving the doctrine of the above case see:

M. K. & T. Ry. Co. v. *Hancock & Goodbar,* 26 Okl. 265, 109 Pac. 223.

Midland Valley R. Co. v. *Ezell,* 29 Okl. 40, 116 Pac. 163.

C. R. I. & P. Ry. Co. v. *Conway,* 34 Okl. 365, 125 Pac. 1110.

St. L. and S. F. R. Co. v. *Zickafoose,* 39 Okl. 302, 135 Pac. 406.

What has been said with reference to the other stipulations relied upon is equally applicable to that provision of the contract limiting the time within which to bring suit for the recovery of damages under said contract.

M. K. & T. Ry. Co. v. *Harriman,* 227 U. S. 639, 57 L. Ed. 683.

The effect of the decision of the Supreme Court of Oklahoma is to render plaintiff in error liable for delay incident to compliance with an Act of Congress.

No attempt was made by defendant in error to show that the alleged failure to deliver the live stock at destination in time for sale on the market of May 15 was due to *negligence* on the part of plaintiff in error or its servants. The case is rested entirely upon the contention that 36 hours was the "customary time" within which to complete the transportation of a shipment of live stock from Fort Worth to Kansas City. This

contention appears to be based upon one instance in the experience of Walter Shepherd, the brother and agent of defendant in error. This party accompanied the shipment, and though he was the principal witness on the trial, he did not point to any act of negligence of plaintiff in error occurring throughout the journey. He gave no account of any delays except that occurring at Afton, where the stock was unloaded for feed, water and rest, in accordance with the requirements of the Act of Congress of June 29, 1906 (34 Stat. L. 607), commonly referred to as "The 28-Hour Law."

The evidence on behalf of plaintiff in error showed that the shipment moved toward its destination within 35 minutes after delivery to it (Rec. 70). All delays occurring between Ft. Worth and Afton are fully explained and accounted for (Rec. 56), and of these delays the State Supreme Court in its opinion mentions only three as being "unexplained" (Rec. 88), but we submit that the record furnishes a full explanation of all these delays, and that they are such only as are incident to the operation of a freight train on a single track road. It is plain, therefore, that the court indulged a presumption of negligence on the part

of plaintiff in error, by reason of the delay occurring at Afton. In the course of the opinion is was said:

> "The undisputed facts disclosing, as they do, that 36 hours was a reasonable time in which to deliver the cattle at their destination, and 68 hours was consumed in the transit, the delay was apparently unreasonable, and hence there was no error in the court holding, as it did, in effect, that the evidence was sufficient to make a *prima facie* case for plaintiff and to take the question of negligence to the jury."

In the first place, we would call the Court's attention to the fact that plaintiff in error could not have consumed 36 hours in the transit without violating the Act of Congress above referred to. It is nowhere claimed that the transportation could have been completed in less than 36 hours, after leaving Fort Worth. But the undisputed evidence discloses that this stock was loaded at 5:45 p. m., May 13th (Rec. 33); it was delivered to plaintiff in error by the belt line company at 7:00 p. m. same date (Rec. 69) and moved at 7:35 p. m. According to the contention of defendant in error, it would have required until 7:35 a. m. May 15th to make delivery at destination, and to this must be added the time necessarily consumed in placing the cars at the stock chute for unloading. Therefore, to have completed transportation without unload-

ing would have required the continuous confinement of the live stock upon the cars for a period of from 38 to 40 hours. The Act of Congress in question not only, in express terms, prohibits such confinement, but provides:

> "In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

It follows that the time said stock were confined on the line of the terminal company must be included, and this, even according to the contention of defendant in error, precludes their delivery without unloading for food, water and rest. The shipment reached Afton at 11:00 p. m. May 14th (Rec. 390), stock having then been confined on the cars for a period of 29 hours and 15 minutes. It would have required approximately twelve hours to complete the transportation into Kansas City (Rec. 58), hence the necessity of unloading for food, water and rest. This was done, and it is conceded that such unloading would prevent delivery at Kansas City in time for the market of the 15th. The following day being Sunday, the

stock were delivered in time for the market of Monday, the 17th, the first upon which it could have been sold.

It has frequently been held that a carrier can not be held liable for delay occurring as an incident to the unloading of live stock in compliance with the requirements of the Act in question.

G. H. & S. A. R. Co. v. *Warnken*, 35 S. W. 72.
Railroad Co. v. *Davenport*, 133 S. W. 186.
Railroad Co. v. *Smith*, 135 S. W. 597.
Railroad Co. v. *West*, 159 S. W. 142.

The unloading of the live stock at Afton, and their detention for the period prescribed by the Act, being of itself sufficient to prevent delivery in time for the market of May 15th, no other alleged delay will be considered, as such delay would clearly not be the proximate cause of the loss or injury complained of.

Mo. Pac. Ry. Co. v. *Paine*, 21 S. W. 78.

We submit that the record and proceedings in the State Supreme Court present errors which seriously affect the rights of this plaintiff in error, and we respectfully pray that the judgment of that court should be reversed.

W. F. Evans,
R. A. Kleinschmidt,
E. H. Foster,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 160.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

H. B. SHEPPARD, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

J. E. THOMPSON,
Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 160.

ST. LOUIS AND SAN FRANCISCO RAILROAD CO.,
PLAINTIFF IN ERROR,

vs.

H. B. SHEPPARD, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

Abstract and Statement of the Case.

Not being able to agree that the statement of the case by the plaintiff in error is supported by the record, we desire to present a counter-statement.

The cattle which form the basis of this controversy were delivered to the railroad company about three o'clock on the afternoon of May 13, 1909 (Rec., 33). An hour and forty-five minutes later they were loaded, and an hour and fifty minutes after being loaded they departed from Ft. Worth.

They were loaded by the railroad company (Rec., 75). The cattle arrived at Sherman, Texas, at 3:15 a. m. on May

14th, and left Sherman at 5:05 a. m. of the same day (Rec., 39), a delay of one hour and fifty minutes at Sherman. This delay at Sherman was occasioned by the negligence of the defendant company, in that it had to call the crew after the train arrived. The delay in calling the crew was occasioned by the negligence of the Frisco dispatcher at Ft. Worth in erroneously reporting the arriving time of the train (Rec., 62). The plaintiff, in writing, requested the company to extend the twenty-eight hour period to thirty-six hours, as he had a right to do under the act of Congress regulating the shipment of live stock (34 Statutes, 1, 607). See statement of counsel for railway company (Rec., 32). The cattle, after the delay at Sherman, were transported by the defendant from Sherman to Francis, a distance of about 105 miles (Rec., 59). The distance shown in the record at page 59 is 96 miles from Denison to Francis, and Sherman is nine miles further from Francis than Denison (Rec., 44). This distance of 105 miles was made in just six hours. The train left Sherman at 5:10, arrived at Denison at 5:40 and at Francis at 11:10 (Rec., 55). The running time between Sherman and Francis, including three stops—Sherman, ten minutes, blocked by No. 7; Madill, thirty-five minutes, A. M. C. in the way and to pick up three cars; Ada, twenty-five minutes, to meet 509 (Rec., 56)—was a little over 17 miles per hour. If the hour and ten minutes in delays at Sherman, Madill, and Ada were taken out and only the running time counted, it would be a little over twenty-one miles per hour. The train was delayed thirty-five minutes at Francis, leaving there at 11:45 a. m. (Rec., 56). The distance between Francis and Sapulpa is 101 miles (Rec., 59). The running time, including a stop of thirty-eight minutes at Weleetka, which the dispatcher was unable to explain (Rec., 61), fifty minutes at Okmulgee (Rec., 61), and a delay at Hamilton Switch, which the dispatcher was unable to give the duration of or the cause for (Rec., 61), was from 11:45 to 3:50, a period of six hours and five min-

utes. This would be, counting the entire time and not deducting the delays, a speed of approximately seventeen miles per hour. Deducting the fifty minutes' delay at Okmulgee and thirty-eight minutes at Weleetka, and not counting anything for Hamilton Switch, the company maintained a rate of speed while actually running of approximately twenty-two miles per hour. The schedule time for freight trains is four hours and forty minutes and the mileage per hour 18.16 (Rec., 62-3). The train left Sapulpa at 6:20 in the afternoon of May 14th, arrived at Afton at 11 the same evening (Rec., 39), making schedule time exactly. The cattle had then been on the road since 7:35, May 13th, or twenty-seven hours and twenty-five minutes, and they yet had eight hours and thirty-five minutes to go from Afton to Kansas City. They were unloaded at Afton at about one o'clock on the morning of the 15th, and 166 head of cattle were placed in a pen 80 x 120 feet in dimensions. The pen was located on the main street of the town. There was a mudhole in the middle of it, and people were continually passing and crawling up on the fence, running the cattle back and forth through the mudhole the entire time they were confined there. The cattle were so crowded that they could not lie down, and therefore got no rest (Rec., 39-40). They were loaded on the cars again at about seven o'clock on the evening of May 15th, permitted to stand in the cars until 9:30, and then transported to Kansas City, where they arrived the next afternoon at 3:15, May 16th, thus taking about 68 hours to transport the cattle from Ft. Worth to Kansas City (Rec., 40).

Plaintiff alleges that had the cattle been handled with proper care and transported with due diligence, they could and would have been delivered at their point of destination within thirty-six hours after they were loaded by defendant at Ft. Worth, but that by reason of negligence and carelessness on the part of the defendant in the transportation of the cattle they were not delivered within that time, and

that, by reason of this delay, it became necessary to unload and feed the cattle at Afton, which cost him $21; that by reason of such delay the cattle were not delivered at Kansas City on the 15th day of May, when they would have been delivered had they been transported with due care and proper diligence, and he missed the market of that date, which was about forty cents above the market of Monday, May 17th, the date on which the cattle, by reason of the delay, were placed on the market.

That part of the statement on page 2 as follows:

> "The sole contention of defendant in error is, and was on the trial in the State court, that 36 hours was a reasonable time in which to transport said live stock from Ft. Worth to Kansas City, and that in the due course of transportation they should have reached destination in time for sale on the morning market of May 15th."

is correct.

It might be added, however, that it was the sole question tried below. No other question was raised until the case reached this court.

ARGUMENT.

The record does not present a Federal question, and the writ of error granted by the Supreme Court of Oklahoma should be dismissed. But one defense was urged on the trial of this case by the railroad company, namely, a denial of negligence. The statement by the respective counsel to the trial jury discloses this (Rec., 30, 31, 32). Around this question revolved the controversy in the Supreme Court of the State. No Federal question was discovered until that court found that there was sufficient evidence to sustain the verdict of the jury on this controverted question. Then it was discovered that the Constitution of the United States and practically every act of Congress relating to Interstate Commerce had been disregarded.

It is submitted that the record discloses no such error. Whether the railroad company was or was not guilty of negligence in transporting the live stock; whether the cattle could or could not have been transported from Ft. Worth to Kansas City within thirty-six hours by the exercise of ordinary diligence on the part of the company; whether thirty-six hours was or was not the usual and ordinary time required to transport live stock over the company's line between said points; whether the delays in this shipment were the usual, reasonable and ordinary delays met with in similar shipments, or were extraordinary and unusual, present no Federal question.

But the railroad company says the Supreme Court of Oklahoma erred because it permitted the shipper to bring a common-law action for damages growing out of the failure on its part to deliver, within a reasonable time, certain live stock delivered by him to it, as a common carrier, to be transported for hire from Ft. Worth, Texas, to Kansas City, Mo., and that this action had the effect of depriving it of defenses contained in certain provisions or stipulations of the shipping contract. It is therefore contended that this resulted in a denial of the exclusiveness of the remedies afforded by the Interstate Commerce Act and, particularly, of the amendment of June 29, 1906, known as the Carmack amendment for any loss, damage or injury to property being transported by a common carrier in interstate commerce.

If this contention be true the case ought to be reversed; but it is not true, as disclosed by the record. The shipping contracts were pleaded in full by the railroad company in its answer, and certain provisions of said contracts were pleaded specially and a breach thereof by the shipper was alleged.

The company claimed exemption from liability under stipulations 4, 11, and 14 of the contract, by reason of noncompliance with such stipulations by the shipper. The breach of those stipulations was one of the triable facts, and that they were not tried grew out of their abandonment as a defense on the trial of the cause. This is disclosed by the

statement of the company's trial counsel (Rec., 32). That statement discloses that the only defense urged was a denial of negligence. No testimony was introduced to sustain these defenses. No request was made for an instruction on these defenses. They were not urged on the trial of this case in the Supreme Court of Oklahoma. The shipping contract was referred to but twice in the railroad company's brief in that court. On page 13 of that brief they made this statement:

> "No written request was made by the owner, or person in charge of the said shipment, that the time of confinement in cars be extended to 36 hours."

When the court's attention was called to the statement of their trial counsel (Rec., 32), admitting that such request was made, they abandoned that contention. In arguing assignment of error number 5 in that court as follows:

> "The court erred in overruling the defendant's demurrer to the evidence,"

they directed attention to that provision of the contract which reads:

> "For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specific time or delivered in any particular way, nor in season for any particular market."

It is submitted that this clause has nothing whatever to do with this case. It is elementary that a railroad company cannot exempt itself from liability growing out of its negligence by entering into a contract to that effect. This provision of the contract did not relieve the carrier of its common-law liability to use ordinary care and diligence in transporting the live stock of the shipper. Under the contract pleaded by the company in this case there was no time agreed upon for delivery. Under this state of facts the law imposed a duty on

the carrier to transport and deliver the live stock within a reasonable time, and if it failed to do so by reason of negligence or want of ordinary care and diligence it became liable to the shipper for resultant damages.

There is no denial here, nor was there in either the trial or Supreme Court of Oklahoma, that the provisions of the contract pleaded by the railroad company were valid and binding. The trouble with the company is that it failed to shield itself by introducing proof that the shipper had not complied with those provisions.

The decision of the Supreme Court of Oklahoma is criticised because it is there held that the contracts had nothing to do with this case. In view of the record this criticism cannot be justified. The shipper does not complain because his cattle were not "transported within any specific time," or "delivered at any particular hour," or "in season for any particular market." His complaint is that they were not transported within the ordinary and usual time required to transport like shipments of live stock from Ft. Worth, Texas, to Kansas City, Mo., and that the delay in such transportation was caused by the negligence and carelessness of the agents, servants, and employees of the company. His contention is that had the company transported his cattle between said points within the time usually and ordinarily required for the transportation of live stock of like character they would have arrived at the point of destination within 36 hours, and if they had arrived within that time they could have been sold on the market on Saturday, May 15, 1909.

The statement contained on page 40 of plaintiff's brief, namely,

> "The effect of the decision of the Supreme Court of Oklahoma is to render the plaintiff liable for a delay incident to compliance with an act of Congress."

hardly deserves serious mention. If the live stock could have been transported from the point of origin to the point of destination within nine hours by the use of ordinary care and

diligence, and if nine hours was the usual time required for such transportation, but, on account of the negligence and carelessness of the company's employees, the shipment was delayed until the time grew to more than 36 hours, and under the Federal statute the company was required to unload, feed, water, and rest the cattle, this fact, if the company's contention be true, would relieve it from liability. If the company, by the use of ordinary diligence and care, could have delivered the live stock to the point of destination within 36 hours, but, by reason of negligence, delivery was delayed beyond that period and the company was, by the Federal statute, compelled to unload, feed, and rest the cattle, it could not claim exemption under the statute. The statute did not produce the delay. It was the result of the want of proper diligence on the company's part. The statute did not occasion the injury; it was brought about by the negligent delay. We do not deem it necessary to support with authority the proposition that a shipper can institute a common-law action to recover damages growing out of negligence, even though he enters into a contract of shipment. The manner of injecting the contract of shipment into the litigation, whether by requiring the plaintiff to make it a part of the petition and plead compliance with its terms or by requiring the defendant to plead it in its answer and exempt itself from liability under its provisions, is purely a matter of procedure and raises no Federal question.

Had either the trial or Supreme Court of Oklahoma struck the contract from the company's answer or refused to enforce its provisions, had the company shown a breach of any of them, quite a different question would have been presented, one which would have properly brought the case here for review. No such condition, however, is presented by the record in this case. The railroad company pleaded the contracts and claimed exemption from liability by certain of their provisions. This was permitted by the State courts, and had the company shown a breach of those stipulations the State

courts would have enforced its rights, as is disclosed by the Oklahoma decisions cited in appellant's brief. The appellant saw fit to waive these provisions and try the case on the question of negligence, and the Supreme Court of Oklahoma very properly held that the contracts ought to be set out of the case.

It is therefore respectfully submitted that the writ of error granted by the Supreme Court of Oklahoma in this case should be dismissed or, in the alternative, that the decision of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

J. B. THOMPSON,
Attorney for Defendant in Error.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY *v.* SHEPHERD.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 160. Submitted January 12, 1916.—Decided February 21, 1916.

A Federal question which is first set up and asserted in a petition for rehearing in the highest court of the State which was not entertained but denied without passing upon the Federal question is not open to consideration here.

In an action for damages for unreasonable delay in transporting a shipment of cattle, in interstate commerce, where the question in dispute was whether the transportation could have reasonably been completed within the thirty-six hours maximum limit under the Federal statute, the court charged the jury that the carrier could not keep the stock in the cars longer than such period, and that if it was not reasonably possible to complete the journey within that time the carrier was not responsible for delay caused by unloading the stock for rest, water and feed, and no exceptions having been reserved or modifications suggested, or other instructions requested, *held*, that assignments of error based on failure to give due effect to the Federal statute are so devoid of merit as to be frivolous and the writ of error should be dismissed.

Writ of error to review, 40 Oklahoma, 589, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Jud. Code, are stated in the opinion.

Mr. W. F. Evans, *Mr. R. A. Kleinschmidt* and *Mr. E. H. Foster* for plaintiff in error.

Mr. J. B. Thompson for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action for damages resulting, as was alleged, from unreasonable delay in transporting cattle from Fort

Worth, Texas, to Kansas City, Missouri, in May, 1909. The plaintiff had a verdict and judgment and the latter was affirmed. 40 Oklahoma, 589. The errors assigned are that due effect was not given to certain provisions of the Carmack Amendment to the Interstate Commerce Act (§ 7, c. 3591, 34 Stat. 584, 595) or to the act limiting the time that cattle in interstate transit may be confined in cars without being unloaded for rest, water and feed, June 29, 1906, c. 3594, 34 Stat. 607.

The claim under the Carmack Amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed by the Supreme Court of the State. The petition was not entertained, but was denied without passing upon the Federal question thus tardily raised. That question therefore is not open to consideration here. *Pim* v. *St. Louis*, 165 U. S. 273; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308; *McCorquodale* v. *Texas*, 211 U. S. 432, 437; *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry.*, 228 U. S. 326, 334.

The claim made under the other act was, that part of the delay was excusable, because the transportation reasonably could not have been completed within the maximum time—thirty-six hours—during which the cattle could be confined in the cars and it therefore became necessary under the act to unload them for rest, water and feed for at least five hours, as was done. Whether the transportation reasonably could have been completed within thirty-six hours was the subject of direct and conflicting testimony and was committed to the jury as a question of fact. In that connection the court said to the jury: "You are instructed that under the laws of the United States the defendant company could not keep the stock in this shipment in the cars longer than thirty-six hours and if you find from the evidence that it was not reasonably possible that the shipment should reach Kansas City

within the thirty-six hour limit, then it is not liable for the delay caused by the unloading of the stock." No exception was reserved to this instruction, no modification of it was suggested and no other instruction upon the subject was requested. It therefore is apparent that the assignments based upon this statute are so devoid of merit as to be frivolous.

Writ of error dismissed.